

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7292, 76-7391

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

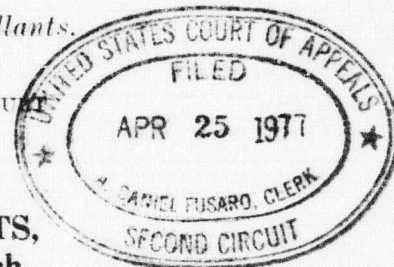
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

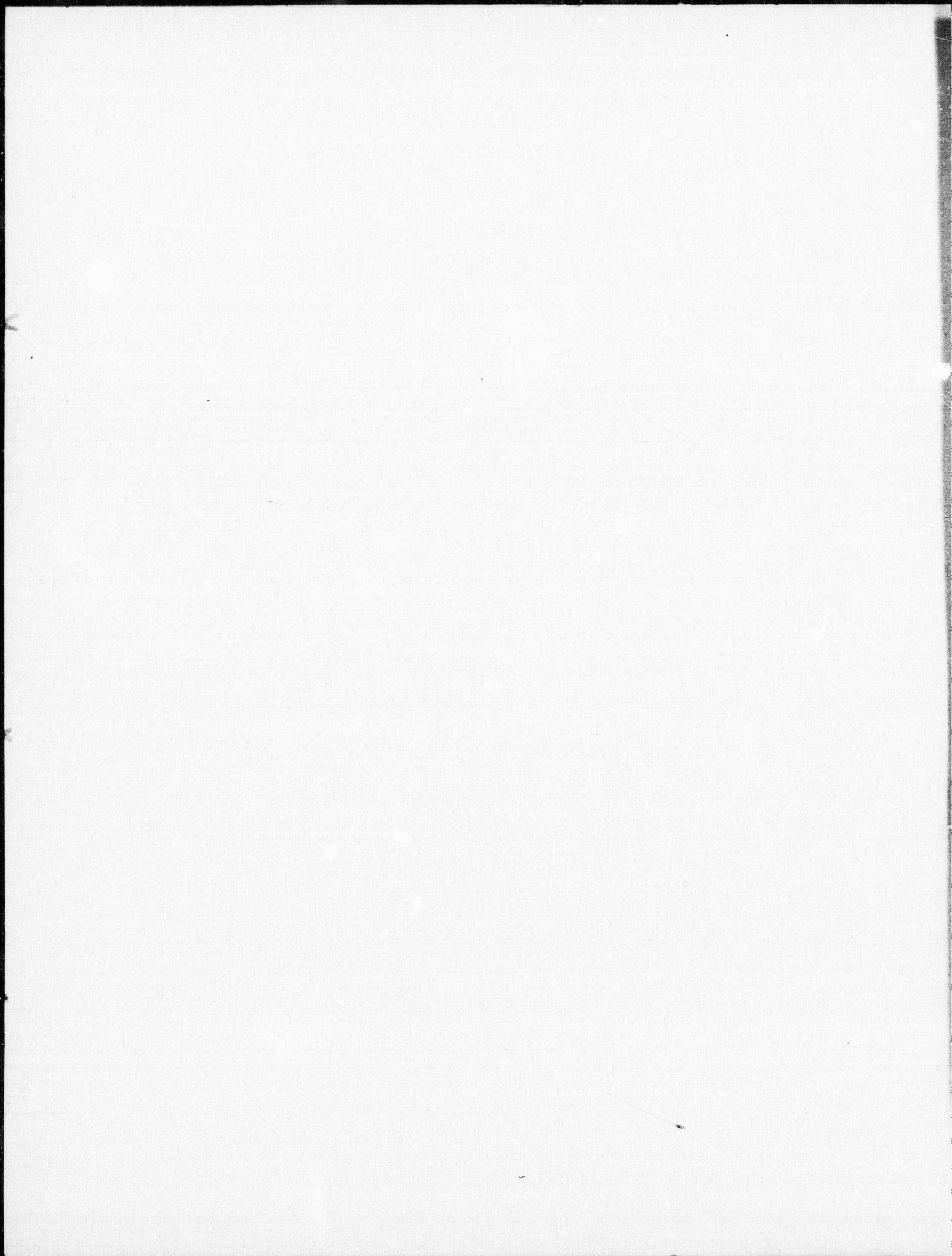
BRIEF FOR DEFENDANTS-APPELLANTS,
Buffalo Board of Education, Joseph E. Manch,
Eugene T. Reville, Superintendent, and
Members of the Buffalo Common Council

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VII.

STATUTES

United States Constitution

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or eman-

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cipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. Section 1343

CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

X.

42 U.S.C. Section 1983

**CIVIL ACTION FOR DEPRIVATION
OF RIGHTS**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Section 2000c-6

Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants.

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such

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complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are to become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation

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would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in *loco parentis*. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18.

Federal Rules of Civil Procedure

Rule 15.

AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause

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them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Federal Rules of Civil Procedure

Rule 19

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

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(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Federal Rules of Civil Procedure

Rule 21

MISJOINDER AND NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

XVI.

Federal Rules of Civil Procedure

Rule 25(d)

**PUBLIC OFFICERS;
DEATH OR SEPARATION FROM OFFICE**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

New York Education Law

Article 52, Section 2551

Board of education corporate body

The board of education of each city school district of a city with one hundred twenty-five thousand inhabitants or more according to the latest federal census is hereby continued as a body corporate.

XVII.

New York Education Law

Article 65, Section 3201

**Discrimination on account of race, creed, color or
national origin prohibited**

1. No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin.

2. Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins; and no school district, school zone or attendance unit, by whatever name known, shall be established, reorganized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established.

XVIII.

New York Public Housing Law

Article 1, Section 3(2)

The term "authority" means a public corporation which is a corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution and includes the following municipal housing authorities established prior to the first day of January, nineteen hundred thirty-nine pursuant to chapter four of the laws of nineteen hundred thirty-four and amendments thereof,¹ namely, Buffalo municipal housing authority, Lackawanna municipal housing authority, New York city housing authority, Peekskill housing authority, Port Jervis housing authority, Schenectady municipal housing authority, Syracuse municipal housing authority, Tarrytown municipal housing authority, Tuckahoe housing authority, municipal housing authority of the city of Utica, New York, and Yonkers housing authority.

IN THE
United States Court of Appeals

For the Second Circuit

No. 76-7292

No. 76-7391

GEORGE ARTHUR, *et al.*,
Plaintiffs-Appellees,

v.

EWALD P. NYQUIST, *et al.*,
Defendants-Appellants.

On Appeal From the United States District Court
For the Western District of New York

**BRIEF FOR THE BUFFALO BOARD OF
EDUCATION, JOSEPH E. MANCH, EUGENE T.
REVILLE, SUPERINTENDENT, AND MEM-
BERS OF THE BUFFALO COMMON COUNCIL**

Questions Presented

Whether the District Court erred in:

- (1) Joining the then present members of the Board of Education and school superintendent as parties after the close of proof and in failing to dismiss the action for lack of subject matter jurisdiction.

(2) Applying the *Hart* test for discriminatory intent in concluding that the City defendants intended to operate and maintain a segregated school system.

(3) Making findings of constitutional violations by City appellants which are unsupported by the evidence and, therefore, clearly erroneous.

(4) In refusing to give weight to substantial evidence tending to rebut its findings of segregative intent against City appellants.

Statement

1. Procedural History

This school desegregation case was filed by the plaintiffs as a class action on June 26, 1972 against Ewald P. Nyquist, Commissioner of Education, The Board of Regents of the State of New York, Joseph Manch, Superintendent of Schools and the Board of Education of the City of Buffalo. With respect to the City of Buffalo School defendants, the complaint alleged that (1) defendants had denied plaintiffs and other members of their class equal educational opportunity; (2) defendants had permitted and intensified the sharp separation of the Buffalo school population into racially identifiable schools; and (3) defendants had created, maintained, permitted, condoned and perpetuated a dual and racially segregated system of public schools.

On April 30, 1974, an order was filed adding as party-defendants the Common Council of the City of Buffalo and its members and the Mayor of the City, Stanley Makowski. The answer for all City defendants was filed July 16, 1974. On October 1, 1974, a joint stipulation of facts was filed and a full trial on the merits commenced. Testimony in the trial

finished on October 23, 1974. Plaintiffs' post-trial brief was filed January 13, 1975 and defendants' briefs on March 17 and 19, 1975. All parties filed proposed findings of fact and conclusions of law in July of 1975 and closing arguments of counsel were made on October 19, 1975.

By an order of April 30, 1976, the District Court granted over defendants' objection plaintiffs' motion to amend the summons and amend the title and Article IV of the complaint by adding the members of the Board of Regents as individuals, the new Superintendent of Schools, and the present individual members of the Board of Education.

On April 30, 1976, the District Court issued its decision and order regarding the question of liability in this case. The defendants were ordered to submit plans to desegregate the Buffalo Public School System. Plans were filed by the City defendants on May 19, 1976 and on May 27, 1976, the plaintiffs made a motion to enjoin the defendants from implementing this plan and to request the Court to appoint a monitor. Hearings on the plaintiff's motion to restrain implementation of the Buffalo Plan began on June 21 and continued through July 1, 1976. The Court filed its decision on the hearing on July 9, 1976. At that time, a plan for the 1976-77 school year was approved.

On June 22, 1976, the Court granted permission to intervene to the Community Advisory Board for Bilingual Education of Buffalo and to City Councilman William A. Price on June 24, 1976. The Court also granted the motion of the Buffalo Teachers Federation, a union for teachers in the Buffalo Public School System, to intervene as *amicus curiae*.

The City and State defendants filed Notices of Appeal on September 20. The State defendants appealed the Court's finding of liability in its April 30, 1976 decision. The City defen-

dants appealed both the finding of liability and the remedy order of July 9, 1976.

The plaintiffs moved to dismiss the City defendant's appeal as untimely. The City defendants maintained that the Court's April 30th decision and order was not a final order and that the time for appealing began to run after the July 9th decision. This motion was argued before the Circuit Court of Appeals in December, 1976. This Court ruled that the appeal was timely.

The District Court filed an order on December 14, 1976 directing all parties to analyze and brief the Supreme Court decision *Austin Independent School District v. U.S.*, 45 U.S.L.W. 3413 (Dec. 7, 1976) and *Washington v. Davis*, 426 U.S. 229 (1976) as they pertain to this case. On December 30, 1976, the City defendants filed a Notice of Motion to vacate, or in the alternative, to reconsider the District Court's decision and order of April 30, 1976 in light of the recent Supreme Court decisions. The District Court on March 1, 1977 filed its decision and order reaffirming the Court's decision of April 30, 1976. A Notice of Appeal from that order was filed by the City defendants on March 8, 1977.

2. Decision of the Court Below on Discrimination

The District Court in its April 30, 1976 decision and order found that

"the Board of Education, the Superintendent of Schools, the Commissioner of Education, and the Board of Regents have violated the plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system."

In support of this conclusion, the District Court made the following general findings of fact:

1. The racial impact of the language program (at East High School) was clearly foreseeable and the failure of the Board to amend this policy when it was obviously aware of its segregative impact is indicative that the Board intended that that segregative effect continue (Appendix at p. 1067).

2. The conflicting evidence is not sufficient to show racially segregative intent on the part of the City or the State defendants with respect to the siting of the Woodlawn Junior High School (Appendix at p. 1086).

3. The Board, in approving the district for Woodlawn Junior High School, fully understood that the result of adopting or creating such a district would be to populate the Woodlawn school totally with black students (Appendix at p. 1092).

4. The Board's transfer and optional areas policies were substantial contributing factors to the segregation at all levels of the Buffalo Public School System, and that this segregative impact was clearly foreseeable by the Board (Appendix at p. 1110).

5. The discriminatory actions of the Board with regard to admissions at vocational-technical high schools had caused segregated conditions to exist at a significant number of those schools (Appendix at pp. 1117-1118).

6. The Board of Education has purposefully followed a policy that has segregated and was intended to segregate the teacher and administrative staffs in the Buffalo Public Schools. The Court cited the failure of the Board to increase the minority teacher percentage, in any meaningful amount, in over ten years' time (Appendix at p. 1130).

7. The Board of Education and the other City of Buffalo officials were encouraged to continue their segregative actions by the Commissioner of Education's failure to discharge his responsibilities under the laws of the State of New York and the Constitution (Appendix at p. 1133).

8. The Court claimed that the City defendants' past action and inaction which have, to a substantial degree, caused, exacerbated or maintained the segregated housing conditions, are separate and independent alternative grounds for holding them constitutionally liable for the segregated condition of the schools in Buffalo (Appendix at pp. 1188-1189).

3. Facts

Buffalo has seen the racial composition of its citizenry change dramatically over the past 30 years. Between 1950 and 1970 the total population dropped by 126,000 while the black percentage rose from 6.5% to 21% (Appendix 81).

In the 1930's and 1940's blacks moved into the lower east side which is commonly referred to as the Ellicott District. Since then, the black population increased and moved in a northeasterly direction. This pattern of residency is clearly portrayed by viewing Hutchinson-Central High School in 1953, the district high school for most black students. In 1973 Kensington and Bennett were racially balanced with heavy resident black populations.

This residential pattern is also reflected when one considers that all the predominantly minority schools, with the exception of Schools No. 16 and No. 17, are in this area. This is also clearly reflected in the census figures.

The Buffalo School System has never operated as a dual system under mandate of law. To the contrary, in 1900 the New York State Legislature enacted an Anti-Segregation Law (N.Y. Educ. Law, § 3201 [McKinney's 1970]). The system as a general rule has traditionally operated on an assignment basis that requires children to attend neighborhood schools. This is not the rule for vocational schools which draw students voluntarily on a city-wide basis.

As of the 1973-1974 school year, the Buffalo School System consisted of 77 elementary schools, two middle and four junior high schools, 7 academic and 6 vocational-technical high schools. The student enrollment was 61,060. The racial balance was slightly in excess of 50% majority. There admittedly exists racial imbalance in the system as is reflected in the following figures.

TABLE I

**ELEMENTARY SCHOOLS 80-100% MINORITY ENROLLMENT
(OCT. 1973)**

| SCHOOL (GRADES) | MINORITY | MAJORITY | TOTAL |
|--------------------|-------------|------------|-------|
| 6 (PK-6)* | 801 (100%) | 0 (0%) | 801 |
| 8 (PK-6)* | 777 (99.5%) | 1 (0.1%) | 778 |
| 12 (PK-6)* | 230 (100%) | 0 (0%) | 230 |
| 16 (PK-6) | 178 (90%) | 19 (10.0%) | 197 |
| 17 (PK-6)* | 465 (99.4%) | 3 (0.6%) | 468 |
| 23 (K-5) | 697 (91.8%) | 62 (8.2%) | 759 |
| 31 (K-8)* | 828 (99.2%) | 7 (0.8%) | 835 |
| Build (former 32)* | | | |
| (PK-6) | 575 (99.7%) | 2 (0.3%) | 577 |
| 35 (Special) | 76 (96.2%) | 3 (3.8%) | 79 |
| 37 (PK-8)* | 809 (99.9%) | 1 (0.1%) | 810 |
| 39 (PK-6)* | 927 (100%) | 0 (0%) | 927 |
| 41 (PK-6)* | 371 (100%) | 0 (0%) | 371 |
| 47 (PK-6)* | 272 (100%) | 0 (0%) | 272 |
| 48 (PK-5)* | 396 (99.7%) | 1 (0.3%) | 397 |
| 50 (Special) | 99 (100%) | 0 (0%) | 99 |
| 53 (PK-6)* | 880 (99.9%) | 1 (0.1%) | 881 |
| 59 (K-5) | 566 (98.3%) | 10 (1.7%) | 576 |
| 62 (K-7) | 712 (92.5%) | 58 (7.5%) | 770 |
| 74 (PK-6)* | 626 (98.9%) | 7 (1.1%) | 633 |
| 75 (PK-6)* | 363 (100%) | 0 (0%) | 363 |
| 90 (K-6) | 512 (89.3%) | 61 (10.7%) | 573 |
| 93 (K-3)* | 99 (100%) | 0 (0%) | 99 |

* The schools marked with an asterisk are schools that were predominantly black in 1965 when Commissioner Allen rendered his decision in the *Yerby Dixon Proceeding*.

TABLE II
ACADEMIC HIGH SCHOOLS
(OCT. 1973)

| SCHOOL | MINORITY | MAJORITY | TOTAL |
|-----------------|--------------|--------------|-------|
| Grover | 45 (22.7%) | 674 (59.2%) | 1139 |
| East High | 1622 (99.0%) | 17 (1.0%) | 1639 |
| Riverside High | 232 (15.1%) | 1301 (84.9%) | 1533 |
| South Park High | 245 (12.7%) | 1683 (87.3%) | 1928 |
| Bennett | 696 (43.3%) | 899 (56.0%) | 1606 |
| Kensington | 827 (43.0%) | 1093 (56.8%) | 1923 |

SOURCE: PX 6, at 22.

VOCATIONAL-TECHNICAL HIGH SCHOOLS
(OCT. 1973)

| | | | |
|--------------------|-------------|-------------|------|
| Fosdick-Masten | 576 (98.1%) | 11 (1.9%) | 587 |
| Hutchinson-Central | | | |
| Technical | 223 (19.8%) | 902 (80.2%) | 1125 |
| McKinley | 235 (20.3%) | 922 (79.7%) | 1157 |
| Seneca | 222 (20.0%) | 891 (80.0%) | 1113 |
| Burgard | 448 (40.6%) | 598 (54.2%) | 1103 |
| Emerson | 244 (43.6%) | 314 (56.0%) | 560 |

SOURCE: PX 6, at 23.

TABLE III
MIDDLE AND JUNIOR HIGH SCHOOLS
(OCT. 1973)

| | | | |
|--------------------|-------------|--------------|------|
| *Fillmore Middle | 690 (89.0%) | 85 (11.0%) | 775 |
| West Hertel Middle | 332 (28.4%) | 837 (71.6%) | 1169 |
| Clinton Junior | 846 (100%) | 0 (0%) | 846 |
| *Genesee Humboldt | | | |
| Junior | 932 (90.9%) | 93 (9.1%) | 1025 |
| Southside Junior | 202 (15.4%) | 1107 (84.6%) | 1309 |
| Woodlawn Junior | 764 (99.6%) | 3 (0.4%) | 767 |

SOURCE: PX 6, at 21.

* Fillmore Middle School and Genesee-Humboldt Junior High School were opened as majority schools. The first statistical record of racial breakdowns is 1966. At that time, Fillmore was 42.4 percent minority and Genesee Humboldt was 31.5 percent minority.

A summary of the preceding tables shows that 22 of the 77 elementary schools were predominantly black. This was also true of East and Fosdick Masten High Schools, Woodlawn, Genesee-Humboldt, Clinton Junior High Schools, and Fillmore Middle School.

Yerby Dixon Proceeding

In 1964, the Commissioner of Education, Dr. James Allen, in the Yerby Dixon Matter, determined that the Buffalo Public School System was racially imbalanced and ordered that Buffalo submit a plan to alleviate said racial imbalance.

In the Opinion and Order the Commissioner says:

"Involved in the ultimate solution to *de facto* segregation in a school system, of course, the elimination of segregated housing, slum conditions and other undesirable socio-economic conditions which lie beyond the control of the Board of Education or of the Commissioner."

Subsequently, Federal District Judge Henderson upheld the statutory power of the Commissioner to make such an Order and importantly, made the first judicial determination regarding the character of the segregation in the Buffalo School System.

On page 130 of that decision the Court said:

"Prior to the Commissioner's Order and adoption of the resulting plan, the City of Buffalo schools were operated along neighborhood lines without regard to the racial composition of the neighborhood which a given school might be scheduled to serve. Through the years, socio-economic factors had resulted in a concentration of the negro population of the city which, in turn, resulted in several of the city's schools becoming predominantly attended by negro pupils."

"Such a condition, commonly referred to as *de facto* segregation, was and is common under the neighborhood school system in effect in many cities throughout the country." [*Offerman v. Nitkowski*, 248 F. Supp. 129 (1965)]

High Schools

The thirteen high schools in the system are divided into two categories, 7 academic and 6 vocational. The academic schools operate on an assignment district basis and deal in general education; whereas, the vocational schools accept students from anywhere in the City and specialize in various skills depending upon the particular school, in addition to the general educational components. The ratio of blacks to whites in each of these schools is shown hereinbefore in Table II.

Only East and Fosdick-Masten High Schools are racially imbalanced minority schools.

In the early 1950's Fosdick-Masten was an academic high school with an integrated student population. It was closed as an academic school and opened as a vocational school with courses that were attractive mostly to girls. It became commonly known as a Girls' Vocational School. There were no racial records kept in those days, but from all indications the school opened integrated. The neighborhood in which the school was located in subsequent years became overwhelmingly black. None of the other vocational schools were as of 1973 more than 50 percent minority.

By 1964, East was predominantly minority. But it cannot be definitely ascertained the actual progression of racial change yearly from the white school of the early fifties to the black school of the 1960's. The lower Court found in this regard "that East is now and has been, at least since 1960, an in-

identifiably black school". The first known records indicate that in the school year 1966, 73 white students transferred out of East High School. During the ensuing years white students continued to transfer from East in varying numbers, the largest being 176 in 1970 (Defendants' Exhibit 8). This exhibit shows that during the years 1966-1971, a total of 625 whites and 530 blacks transferred out of East High School.

A change in this policy was made in 1972, prohibiting white students in the East High School District from transferring out for the purpose of taking a language at another school. This change of policy did not improve the racial balance at East High School.

There were certain boundary changes in the East High School district prior to 1966. These boundary changes are set forth on pages 30-31 of the Decision and Order.

Transfers and Option Zones

The Buffalo School System permitted students to transfer from one assignment district to another for well-defined reasons. The District Court recognized the need for such a policy to provide the flexibility necessary to operate such a large school system. This transfer policy, in effect for many years, predated racial considerations in the system. Of course, racial reasons were never the stated reason on the application for transfer. The reasons stated were always legitimate, e.g., medical reasons accompanied by doctor's certificates.

The above applies also to option zones.

Junior High and Middle Schools

The Buffalo School System has four junior high schools, Woodlawn, Clinton, Genesee-Humboldt, and Southside. At

the time of trial, Southside, which was located in a virtually all white neighborhood, was 11.5% minority. The year before, it was 15.6%. The lion share of this minority representation was contrived to make the school integrated. Clinton, Woodlawn, and Genesee-Humboldt were at the time of trial virtually all black. Clinton was located in the first all black neighborhood and was predominantly black from its inception in the early 1950's. Genesee-Humboldt located in a changing neighborhood was in 1966, the first year of record keeping, only 31.5% minority. From the school year 1966 to 1973, Genesee-Humboldt saw its white enrollment drop from 749 to 93. Woodlawn was black from inception. These schools have been feeders to East High School. They did not have a language transfer policy.

West Hertel Middle School was opened as an integrated school (26.1%) black and here the integration was a result of action by the Board. Fillmore Middle School was in 1966 (42.4%) black. At the time of trial, it was 88.0% black. From 1966 to 1973 this school lost 452 white students. Fillmore has also fed into East from inception.

Compliance with State Mandate to Improve Racial Balance

In 1965 Commissioner Allen directed that the "de facto" segregation (racial imbalance) in the system be corrected. The school system thereafter did take steps to correct this racial imbalance. There is little doubt, and the Commissioner at trial so admitted, that correcting racial imbalance could only be accomplished through the extensive use of involuntary bussing.

The School Board, however, did take steps to correct racial imbalance. At the time of trial, of the thirteen high schools, only two had more than 50% black student enrollment, six

were racially balance, and none had less than 10% minority enrollment. Much of this was accomplished through the use of boundary changes and by permitting blacks to transfer out of all black East High School.

At the time of trial approximately 3000 black elementary students yearly were being transported on a voluntary basis from predominantly black schools to majority schools. These students upon graduation could attend the high school which the receiving school fed into, instead of the high school in his or her district, most likely East.

In the early 1950's East High School was predominantly white. Correspondingly, the East High School assignment district was predominantly white. At this point in time, the black population was increasing and moving from the southeast of the City in a northeasterly direction. The East High School district changed racially because of this dramatic residential change. The lower Court acknowledges these factors.

Certain languages, such as French, Spanish and Latin, have been taught at all academic high schools. Because of the usually small demand for other languages, they were only offered at schools where there is a demand. Students were permitted to transfer to a school where the subject was offered if they desired.

This policy was formulated without any concern for racial imbalance but was based on the need to respond affirmatively to legitimate demands for such courses of study.

In 1960 Polish was dropped at East High School. The District Judge took judicial notice that many Polish families reside in this district and would want the course.

The Buffalo School Board purchased 22 portable classrooms and located the same at majority schools, enlarging the capacity of those schools to make room for inner-city black students for integrative purposes.

Extensive compensatory educational programs have been initiated with the major emphasis being in the inner-city area.

Improvements of consequence have been made to recruit black teachers and to promote those already in the system to higher positions on the administrative staff.

West Hertel Middle School, the only new school constructed in the system in the last decade, was changed from a junior high school before opening in order to better balance the student body.

Common Council Actions

Under New York State Law, the Buffalo Board of Education is autonomous. They, however, must rely upon the City of Buffalo for funding whether it be for operation and maintenance or capital improvements. The District Court found that the Common Council by certain intentional discriminatory actions and non-actions, contributed to and continued the racial segregation in the schools.

The School Board sought initial funding for the West Hertel Middle School for the stated purpose of constructing a junior high school. This school was needed to alleviate overcrowding at Riverside High School in the northwest section of Buffalo. When construction was virtually completed, the School Board for integration purposes changed the component to a middle school. For a number of weeks the Common Council failed to provide the funds necessary for completion of the school. The District Court found that this

delaying action was racially motivated. Although the money was eventually appropriated by the Council, the school was completed, and it opened as an integrated middle school, the District Court found this was evidence of an invidious intent to discriminate.

There was also the matter of the portable classrooms. The Common Council adopted an ordinance prior to the purchase of the portables by the Board, prohibiting the construction of additions to school buildings if the addition was of a material different from the main building. The legality of this measure was litigated in the state Courts and ultimately held to be beyond the power of the Council to adopt. Here again the integrative action became a reality.

The Common Council, although asked by the Board to do so, never appropriated funds for the planning of additional middle schools which schools were part of the School Board's plan to improve racial balance. The plan called for six such schools, that would cost an estimated six million dollars each. It is important to note here, that the West Hertel Middle School was the only new school constructed in a decade because of the financial problems of the City.

The plaintiffs further charged that the Common Council refused to adopt a housing law prohibiting discrimination in housing beyond that which is prohibited by the Federal Government and State of New York. New York State has probably the most extensive housing law in the country.

Woodlawn Junior High School

Woodlawn Junior High School was built in the early 1960's after strong urging by the black community. It was located on East Ferry Street and Michigan Avenue one block east of Main Street, which at that time was somewhat of an artificial

boundary for blacks and whites. The plaintiffs charged that the School Board, in choosing this site, knew that the school would be segregated upon opening. They further charged that when establishing the district the School Board drew a boundary that assured that the school would open as a segregated school. The District Court found that because of the recent migration of blacks into the Woodlawn area (late 1950's), many of the elementary schools in that area, were all predominantly black, overcrowded and were not in good condition. He additionally found that the black community generally wanted a new school in that area to service the needs of that area and concluded that based on the evidence, the School Board was not racially motivated in selecting the site.

When the school was complete, many hours of discussion occurred as to what would be the district boundaries. There were a number of plans submitted by Board members and the one adopted extended across Main Street into predominantly white neighborhoods. However, when this plan was adopted, an option zone was created for the area west of Main Street. This plan went into effect and when the school opened, it opened virtually all black.

Staff

Buffalo like New York City is required by State law to give an examination to all its teacher applicants. In May, 1965, Commissioner Allen found that there was no substance to the charge that there was discrimination in the hiring and assigning of teachers and staff in the system. There has never been any school in the system that had a faculty that was all black. With the exception of School No. 32, also known as the BUILD Academy, no school in the system had a faculty of minority teachers exceeding 32 percent. BUILD Academy is a

school that operates under special agreement between the school system and the BUILD Association. The BUILD Association is virtually an all black association and pursuant to said agreement had a veto power over the faculty. Until the School Board in the early 1970's adopted a practice of prohibiting white teachers from transferring out of minority schools, transfers were permitted on the basis of seniority.

ARGUMENT

POINT I

Lacking subject matter jurisdiction in this case the trial Court erred in adding after the close of proof current members of the defendant School Board and School Superintendent, and there being no evidence to connect a majority of the named Board or City Common Council members to any of the alleged constitutional violations, the action should be dismissed.

The plaintiffs in this case allege a cause of action under 42 U.S.C. Section 1981 *et seq.* and the Fourteenth Amendment to the United States Constitution. Jurisdiction was asserted solely under 28 U.S.C. Section 1343.

The plaintiffs alleged that the defendants violated 42 U.S.C. Section 1983 which provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

The original defendants named in the case were the Buffalo Board of Education, Dr. Manch, the Superintendent of Schools, the State Board of Regents, and Mr. Nyquist, the State Commissioner of Education. Before the trial, the Court granted the plaintiff's motion to amend their complaint to include as party-defendants the Common Council of the City of Buffalo.

After the trial of the action, the appellants raised the objection that the Board of Education and the State Board of Regents were not "persons" within the meaning of 42 U.S.C. Section 1983. The plaintiffs then requested the leave of the Court to amend their complaint again, this time to add as parties-defendant in their individual and official capacities, the present Superintendent of the Buffalo Schools, the present members of the Buffalo Board of Education and the State Board of Regents.

Without stating a decision on the question of whether the Board of Education and State Board of Regents were "persons" and thus were parties within the subject matter jurisdiction of the Court, the Court granted the plaintiffs' motion to amend the complaint (Order dated April 30, 1976, Amended June 10, 1976). (Appendix at pp. 1013 and 1225).

The District Court Lacked Subject Matter Jurisdiction Over the Board of Education and the Common Council.

The Court should have dismissed the Board of Education and the Common Council as party-defendants on the ground that such parties are not "persons" within the scope of Section 1983. See *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha*

v. Bruno, 412 U.S. 507 (1973). *Monroe* held that a municipality was not a "person" and dismissed a Section 1983 claim for money damages against the City of Chicago. In *Kenosha* the Court made it clear that municipal corporations are not within Section 1983 for either both equitable relief or damages.

Since the *Kenosha* decision the rule that municipal corporations are not "persons" has been interpreted to apply to departments or "arms" of a municipality. The rule that a school board is not a "person" within the meaning of Section 1983 is viewed by the Court in *Ingraham v. Wright*, 525 F. 2d 909 (5th Cir., 1976), as "well-settled". Similar results are found in *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir., 1976), *Adkins v. Duval County School Board, et al.*, 511 F. 2d 690 (5th Cir., 1975) and *Mims v. Board of Education of the City of Chicago*, 523 F. 2d 711 (7th Cir., 1975). Likewise, the Common Council cannot be a "person" within Section 1983. The Council, for § 1983 purposes, is an integral part of the municipality. Alternatively, it can be seen that the Common Council, as the legislative body of the city, must be viewed for the purposes of jurisdiction as if it were a municipality.

Plaintiffs laid jurisdiction under 1343(3) of Title 28 U.S.C. It becomes essential therefore to decide whether the District Court here ever acquired jurisdiction over the necessary parties since if neither the School Board nor the Common Council of the City are persons under 42 U.S.C. Section 1983, then no cause of action can exist as against them and *a fortiori* no jurisdiction could have attached to them under 28 U.S.C. § 1343. See *Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4079, at 4080-4081 (January 11, 1977).

The Court Should Not Have Granted Plaintiffs' Motion to Amend the Complaint to Add New Parties-Defendant.

The additional parties-defendant that the Court added were, as stated above, the *present* Superintendent of Schools and the *present* members of the Board of Education. Of these, all but two members of the Board, Mrs. Baugh and Mr. Murphy, were new parties who have never served as officers during the periods of time covered by the plaintiffs' proof. Given the personal nature of an action under 42 U.S.C. Section 1983, this fact is critical.

That liability under Section 1983 is personal was made clear in *Rizzo v. Goode*, U.S., 46 L Ed. 2d 561, 96 S.Ct. (1976). *Rizzo* involved two class actions under Section 1983 which had been brought against the Mayor and supervisory police officials of Philadelphia. The plaintiffs sought equitable relief from an allegedly pervasive pattern of unconstitutional police mistreatment of minority and other citizens. After noting that the officers identified as the principal antagonists were not named as parties, the Supreme Court reviewed the nexus between the alleged violations and the named defendants. In such review, the Court spoke in terms of whether there existed an "affirmative link", "causal connection" or "direct responsibility" between the alleged violations and the defendants. Finding insufficient evidence of such nexus, the Court stated that the case "presented no occasion for the District Court to grant equitable relief", 46 L Ed. 2d at 573.

The personal nature of a Section 1983 action is also established in numerous cases rejecting the imposition of liability under Section 1983 upon an imputed or vicarious basis, *Manfredonia v. Barry*, 401 F. Supp. 762, 770 (E.D.N.Y. 1975), *Lathan v. Oswald*, 359 F. Supp. 85, 89 (S.D.N.Y. 1973),

or upon a theory of *respondeat superior*, *Palermo v. Rockefeller*, 323 F. Supp. 478, 483 (S.D.N.Y. 1971), *Salazar v. Dowd*, 256 F. Supp. 220, 223 (D. Colo. 1966), *Jordan v. Kelly*, 223 F. Supp. 731, 739 (W.D. Mo. 1963). Both of the latter cases involved civil right actions under Section 1983 in which improper arrests were alleged. In each case, administrative officers were dismissed when plaintiffs failed to link them to the alleged violation. In *Salazar* the Court noted that "Personal involvement is contemplated.", 256 F. Supp. at 223. In *Jordan* the Court stated that:

"The chief of police would not be responsible for the wrongful acts of the officer unless he was present or unless it is shown he directed such acts or personally cooperated in them . . ." (223 F. Supp. at 739).

Although the above cases are not identical to this case, they establish the importance of the element of personal liability in Section 1983 suits for damages and equitable relief. Since practically all of the parties-defendant added by the Court did not hold any office or position in relation to the School Board at the time of the alleged violations or during the time periods covered by the plaintiffs' evidence, it was impossible for plaintiffs to prove the necessary "personal involvement" or "affirmative link" against these parties-defendant. In the above-cited cases, the defendants were at least in office at the time of the alleged violations. An even stronger case for the dismissal exists when as here the parties added were not in office at the time of the alleged violations (See *Salazar, supra* at 223).

In his order granting the plaintiffs' motion to amend, the District Court cited language in *Monell v. Social Services of the City of New York, supra*, which states:

"There is no doubt that municipal and state officials, sued in their official capacities are "persons" within the

meaning of Section 1983 when they are sued for injunctive or declaratory relief." 532 F. 2d at 264.

As the *Monell* case was an action for money damages, the above statement is of course dicta, but more importantly, the cases cited in *Monell* as authority for the statement are consistent with the requirement of personal liability under Section 1983. In *Wright v. Chief of Transit Police*, 527 F.2d 1262, 1263 (2d Cir. 1976), *Gresham v. Chambers*, 501 F.2d 687, 690 (2d Cir. 1974) and *Erelmann v. Stevens*, 458 F.2d 1205, 1207-08 (2d Cir. 1972), cert. denied, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed. 2d 147 (1972), the defendants were individually named at the beginning of the action and no question of personal involvement existed. Thus, in *Wright* the Court noted in relation to the defendants:

"(A)s the individuals responsible for the enforcement of the Transit Authority policy challenged here, defendants play a substantial role in the deprivation of civil rights alleged by plaintiffs" 527 F.2d at 1263

Clearly, the important question is not whether a party can be sued in their "official capacity" but whether the party in any capacity had a sufficient nexus to the alleged violation to bring him within the scope of Section 1983 as a culpable constitutional tortfeasor. As the majority of the parties added by the Court's order of April 30, 1976 could have no such nexus to alleged violations and the plaintiffs' evidence from time periods before their appointment to office, they should be dismissed. The only parties-defendant added by the order who held office at the time of any alleged violations were two members of the School Board.

Even if the addition of these two parties as defendants can survive the objection based on due process grounds set forth below, two members do not constitute an effective majority of the School Board. They therefore cannot be liable for

Board actions and equitable relief running only against them would be meaningless.

The Involuntary Addition of the New Parties-Defendant Over a Year After the Trial Violated Due Process.

Appellants' second objection to the addition of the present members of the Board and the present Superintendent of Schools as parties-defendant arises from the timing of such addition. The plaintiffs moved for the amendment of the complaint over a year after the close of the trial of the action. To add these parties at that time was to deny them an opportunity to be heard and to defend themselves, and therefore violated the due process requirement of the Fifth Amendment. Such rights are basic to our system of justice and cannot be lightly brushed aside. As said in *Goldberg v. Kelly*, 397 U.S. 254 at 268, 25 L Ed. 2d 287, 299 (1970):

“ ‘The fundamental requisite of due process of law is the opportunity to be heard’ *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L Ed. 1363, 1369, 34 S. Ct. 779 (1914). The hearing must be ‘at a meaningful time and in a meaningful manner.’ *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L Ed. 2d 62, 66, 85 S. Ct. 1187 (1965).”

In cases involving the joining of parties under Rules 15, 19 and 21 of the Federal Rules of Civil Procedure, the Courts have emphasized that added parties should have an opportunity to defend. Under FRCP 15(a), leave to amend is allowed only “when justice so requires.” When the amendment will, as here, prejudice the opposing party, justice requires the denial of leave to amend:

“Leave to amend is within the sound discretion of the trial court and will be denied where fairness to the opposing party so requires. (Citations Omitted)” *In-*

dependent Taxicab Operators Association of San Francisco v. Yellow Cab Co., 278 F. Supp. 979 at 988 (N.D. Calif., 1968).

It should be noted that to categorize the amendment granted by the Court as one which "relates back" to the date of the original complaint under FRCP 15(c) does not remove the prejudice inherent in the amendment. First, an amendment will be held to relate back only if the party to be added by the amendment:

"(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." FRCP 15(c).

In the present case, no such notice has been received and the added parties-defendant are not only prejudiced, but foreclosed from maintaining a defense. Although the added parties-defendant may have been aware of the existence of the pending suit prior to taking office, it was not their conduct that was alleged to be a violation or to which proof was offered and therefore Rule 15(c) by its terms is inapplicable. Secondly, even if the amendment to add the parties-defendants were to "relate back" to the date of the original complaint, the complaint would still not contain any allegations relating to personal liability against current office holders.

It is thus clear that while 15(c) may be relevant to establish the effective date of an amendment when the issue involves a statute of limitations or other such matter, it has no application in the case before the Court.

The District Court stated in its order granting the Plaintiffs' motion to amend that:

"In this case, had the individual defendants been properly named originally, the present members of the Board of Education and Board of Regents would automatically have been substituted. Federal Rule of Civil Procedure 25(d)."

FRCP 25(d) provides that when a public officer who is a party to an action in his official capacity ceases to hold office, his successor is automatically substituted as a party. Given the personal nature of actions under Section 1983 discussed above, it is clear that defendants in Section 1983 actions cannot be automatically substituted even where, as here, they are said to be sued in their "official capacity". Since the Court made clear that the parties defendant added by motion were added in their official capacities and since liability under 42 U.S.C. Section 1983 is personal, the addition of these individuals could not cure the jurisdictional defect as regards the members of the Board of Education.

The City Parties-Defendant Should be Dismissed.

In summary, the complaint in this action should have been dismissed as against defendants, the Board of Education, the Common Council, the present Superintendent of Schools and the present members of the Buffalo Board of Education. Since the legal objections to adding these parties clearly raises the lack of federal subject matter jurisdiction over this action, the objections can be properly raised despite the fact that the trial of the action has been held and a judgment rendered. Lack of subject matter jurisdiction can, and must, be raised at any time. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740, 47 L Ed. 2d 435, 439 (1976), *City of Kenosha v. Bruno*, 412 U.S. 507, 511, 37 L Ed. 2d 109, 115 (1973), *Louisville and Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 53 L Ed. 126 (1908). See also *Mt. Healthy School District Board of Education v. Doyle*, 45 U.S.L.W. 4079, 4080 (Jan. 11, 1977).

Two parties-defendant for the City therefore remain in this action—Dr. Joseph Manch, the former Superintendent of Schools, and the individual members of the Common Council. As to Dr. Manch, it is evident that equitable relief against him is meaningless as he is no longer Superintendent of Schools. Further, no segregative acts were proven against him. He should have been dismissed from this action. As to the Council, the following points of the brief will conclusively show that the plaintiffs have not proven the personal liability required for 42 U.S.C. Section 1983 against the individual members of the Council. Therefore, a complete case of liability cannot be maintained. For all these reasons, the action must be dismissed against all City appellants.

POINT II

A. The District Court improperly used the *Hart* test to support its finding that the defendants' conduct was based on a segregative intent.

In discussing the law applicable to a school desegregation case in its original order, the Court referred to *Keyes v. School District No. 1*, 413 U.S. 39 (1973) to establish the essential elements of proof necessary to support a judgment for plaintiffs (Appendix at pp. 1042-1043). Citing *Keyes*, the Court properly stated that to find *de jure* segregation in a *de facto* circumstance, there must exist a purpose to segregate (Appendix at p. 1043).

A question, therefore, developed as to how a federal district Court should determine whether the critical element of segregative intent as required by *Keyes* existed. The District Court chose to follow the method adopted by this Circuit in *Hart v. Community School Board*, 512 F. 2d 37 (2d

Cir. 1975) that it is enough to show "that the probable and foreseeable result of defendants' acts was segregation." (Appendix at p. 1044).

In reviewing the evidence under six elements of the plaintiffs' case, the Court determined that because the activities in question had a naturally foreseeable impact upon racial imbalance, they were, therefore, done with a segregative or discriminatory intent or purpose. It is City appellants' position that the foreseeable impact test as employed by the District Court was improper.

After the District Court entered its order, the United States Supreme Court decided *Washington v. Davis*, 426 U.S. 229 (1976); *Austin Independent School District v. United States*, U.S., 45 U.S.L.W. 3413 (Dec. 7, 1976); and *Village of Arlington Heights v. Metropolitan H.D. Corp.*, 45 U.S.L.W. 4073 (Jan. 11, 1977) [hereinafter *Arlington Heights*].

City appellants moved the District Court to reconsider its original decision in light of the new and stricter standards laid down by the Supreme Court to be followed by the Courts in deciding questions of segregative intent. The District Court agreed and by decision and order dated March 1, 1977, reaffirmed its original decision in all respects.

In *Hart, supra*, this Court said that:

"Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation." 512 F. 2d at 50.

The City appellants' position is that the Supreme Court has now spoken to the contrary. As the District Court below said in its reconsideration opinion:

"To the extent that the *Hart* standard suggested that mere cause and effect, mere analysis by way of a 'reasonable and foreseeable consequences' test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, it is refuted by *Washington v. Davis* and *Arlington*." (Appendix at 1317).

The District Court also said it understood that the Supreme Court had made clear the "necessity" of establishing that the "motive behind actions or inactions and not the resultant impact alone, is determinative when a constitutional violation is alleged." (Appendix at p. 1318).

However, in approaching its reconsideration, the Court said the issue was whether

"the defendants intentionally acted or *refused to act* so as to segregate and maintain the segregated conditions of the Buffalo Public School System, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent." (Appendix at p. 1318) (Emphasis added).

There are two problems with this formulation. The first is that the District Court continued to view omissions, failures to act, or refusals to act by the School Board as proper evidence justifying an inference of segregative intent. Appellants maintain that omissions in themselves are not relevant evidence of a segregative intent unless the same degree of deliberate and factual segregative motive is clearly established. Second, the Court misapplied the holding of *Washington v. Davis, supra*. The District Court said the issue was whether it had found a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent (Appendix at p. 1318). *Washington* held that in cases alleging a constitutional

violation, there must be a specific finding of a discriminatory purpose and that official actions having a disproportionate racial impact cannot in themselves be a basis for inferring that such actions were motivated by a purpose to discriminate or segregate on the basis of race. This clarification is important because City appellants maintain that in both its original decision and its reconsideration, the District Court in fact found a discriminatory intent in regard to a significant portion of the Buffalo Public School System on the sole basis of the alleged disproportionate racial effect of certain acts or omissions of the School Board and City Council.

In *Arlington*, the Supreme Court clarified the tests for the required finding of discriminatory purpose or motive. Although racial impact could be a starting point, it seems clear from the other indicia mentioned by the Court that more than an objective reasonable man standard of legal fault of negligence cases is necessary. The Court in *Arlington* specifies legislative history, unexplained and abrupt departures from past practice and personal admissions of the target public officers as a basis for the required inference of an illicit motive. *Arlington, supra*, at 4078. Such evidentiary tests mean that the character of the racial purpose justifying a finding of liability is of a subjective and not objective quality. Thus, by indicating as clearly as it has in *Arlington* that the illicit purpose must have existed and motivated the official segregative actions, the Court implicitly rejects a rule that would impose liability as if the officials were so motivated despite, in fact, being racially neutral. A brief review of the evidence and conclusions of the District Court illustrates its findings and conclusions are founded upon the objective foreseeable effect test of *Hart* and not the subjective motive or purpose test of *Arlington*. The sufficiency of the Court's findings on each topic will be more fully argued in Point III, *infra*.

East High School

The Court focused on the foreign language policy change by the Board in 1960 (Appendix at p. 1319). But nothing else in the record shows this change was racially motivated. The plaintiffs' evidence shows that when the change was made in 1960, the school was already substantially minority enrolled. The Court's heavy reliance upon foreseeable impact in establishing intent is apparent (See Appendix, pp. 1069-1079).

Woodlawn Junior High School

The Court claimed that there was overwhelming evidence that the Board intended this school to be a minority junior high school (Appendix at p. 1320). All the evidence shows is that the Board could not practically integrate the school. Such integration could only have been accomplished by artificially drawing boundary lines. Therefore, by adhering to its neighborhood school policy, the final boundary lines naturally resulted in a predominantly minority student enrollment since the feeder schools in that area were predominantly minority. Thus, the Court's reliance on the foreseeable impact test to establish intent is quite evident (Appendix at p. 1086).

Transfers and Optional Zones

The Court's continued reliance upon the objective foreseeable impact test of *Hart* is especially obvious in this area of the proof. The Court sought in its opinion to associate annual transfers with the evident racial imbalance in various schools. As explained under Point IV of the brief, the evidence here is simply inadequate either to establish a causative relationship between any particular transfers and racially imbalanced schools. The policy was a long standing one, requiring objective reasons and was consistently administered by the Board.

The gist of the Court's reasoning is that some majority parents may have manipulated the system to avoid predominantly minority schools. The Board, the Court reasoned further, should have been aware of this and its failure to avoid the effect of such transfers establishes a discriminatory purpose (See Appendix pp. 1109 and 1110). Again, the Court's approach fails to conform to the requirements of *Washington v. Davis* and *Arlington*.

Vocational-Technical Schools

The District Court asserted that "the Board admitted that its admissions policies at particular schools were discriminatory . . ." (Appendix at p. 1321). This is simply not the case. The Court references no testimony to support its statement; to the contrary, in its original decision, it relied heavily upon testing and interviewing procedures to show intent by applying the foreseeable effect test (See Appendix, pp. 1113-1118). It seems clear that on this element of the case, the District Court was using a Title VII employment discrimination case approach specifically ruled inapplicable to a school desegregation case in *Washington, supra*.

Staff

Again, the Court asserts there was an admission that minority staff were intentionally assigned to predominantly minority schools. Appellants denied this and, as is explained under Point IV of this brief, even if there was some such purpose behind such assignments, it was done for educationally sound reasons which negate any illicit character to the Board's staffing policy. As regards recruitment, the Court admits that original finding was based solely upon a statistical-effect analysis and therefore insufficient (Appendix at p. 1322). The Court attempts to rehabilitate its finding here by adding to it its finding of intent in other areas including staff

assignment. Again, the Court's entire analysis here is very much that of a Title VII hiring discrimination case contrary to the rule laid down in *Washington*. The district Court's approach and reasoning here does not follow and is unpersuasive. Further, the cases relied upon by the Court to support its conclusion on this issue have been implicitly overruled by *Washington, supra*.

Common Council

In its original opinion, the District Court invoked evidence concerning the Ellicott District Relocation project against the City Common Council (Appendix at p. 1181). The Court's finding was that the relocation program was conducted in a manner calculated to have the effect of further concentrating minority families in the central city. As argued under Point IV *infra*, there is no evidence that the Council was responsible for this program, its implementation being an administrative responsibility and the Court finding no constitutional violations against the Mayor either individually or officially. Assuming, *arguendo*, that some responsibility was proven, the use of the foreseeable impact standard is again clear. In an attempt to cure this defect, the Court in its reconsideration opinion turned its attention to the Council's abortive effort to prevent the use of so-called portable classrooms and its delay in fully funding construction of the West Hertel Middle School (Appendix at pp. 1322-1323). Both incidents occurred in the late 1960's, a time when most of the schools pointed to the Court were already racially imbalanced. The anti-portable classroom ordinance was subsequently voided by the New York State Supreme Court (Appendix at p. 117). Also, the bonds necessary to complete the West Hertel Middle School were adopted by the Council, the school was completed and opened with an integrated student body (Appendix at

pp. 1618 and 1355). The evidence of racial motivation behind these ineffectual actions was insubstantial, and based upon uncorroborated hearsay. More importantly, such actions could not have had any appreciable impact upon the racial imbalances then or later existing in the school system.

The Court's attempt to fix constitutional liability upon the Common Council for the *de facto* segregation within the entire Buffalo system that had developed over at least a thirty-year period based upon such tenuous evidence and unpersuasive reasoning is clearly erroneous.

Housing

In its review of its findings on housing, the District Court asserts that the Common Council "... intentionally caused the minority families to be relocated to minority neighborhoods during the Ellicott District redevelopment is supported by the evidence." (Appendix at p. 1325). To the contrary, there is no such evidence in this record and the Court points to none. Even if this were the fact, it could not reasonably fix liability upon the Common Council for a segregated school system since there is also no evidence to suggest that the Council had any control over the administration of the school system. Under New York law, city boards of education are separate and autonomous legal entities (New York Education Law, Sec. 2551). They are fiscally dependent upon their respective city governments for funding but this fact in no way provides the city's governing body or executive any prerogatives with respect to the expenditure of such funds once appropriated to the School Board. New York Education Law, Section 2576; see *Fuhrmann v. Graves*, 235 N.Y. 77 (1923).

Conclusion

The District Court used the *Hart* foreseeable impact test in reaching its conclusion that the Buffalo Public School System was *de jure* segregated and in attributing responsibility therefor to City appellants. This is not the proper test given the requirement of a subjective segregative motive established by *Arlington Heights*. The evidence in this case failed to establish a discriminatory purpose on the part of City appellants. The Court's reconsideration opinion only serves to make this error more apparent and further reveals the insufficiency of the Court's findings and conclusions on this critical issue. Since an improper legal test was used by the Court, its findings are clearly erroneous.

POINT II

B. The Court erred in both its original opinion and reconsideration decision in failing to specify those portions of the Buffalo Public School System segregated as a result of City appellant's actions.

The District Court's original Decision and Order makes general conclusions in finding a constitutional violation against City appellants in respect to the Buffalo Public School System. The specific instances of actions by the appellants are used as the basis for the Court's general conclusion. In its Motion for reconsideration appellants requested the Court to specify which portions of the school district were in fact segregated as a result of defendant's alleged constitutional violation (Appendix at p. 1299). Although the Court did reconsider its findings, it completely failed to respond to appellant's request to specify the segregated portion of the

school district. Such specification was necessary to enable both the Court and parties to correctly formulate a remedy in conformance with the Supreme Court's guidelines in *Milliken v. Bradley*, 418 U.S. 717 (1974) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) as was said in *Swann*:

"As with any equity case, the nature of the violation determines the scope of the remedy". (402 U.S. at 15-6)

The need for judicial guidance in developing a remedy in desegregation cases was specifically mentioned by the Fifth Circuit in *U.S. vs. Texas Education Agency*, 467 F. 2d 848-883 (5th Cir., 1972) (Austin I):

"It is necessary, however, in the appellate process, where many complicated school cases involving urban school systems are within the jurisdiction of this court, that some definitive direction be given with respect to the remedy which is to be fashioned in the district courts". 467 F. 2d at 883

In the present case the District Court's findings with respect to specific actions by appellants blurs the scope of the constitutional violation and, therefore, the scope of the remedy. The District Court should have specified those violations which require remedial efforts (cf. *Austin Independent School District v. United States*, 45 U.S.L.W. 3413 [Dec. 7, 1976]). Its failure to do so requires a remand for this purpose.

POINT III

The District Court's finding of segregative intent against City appellants was clearly erroneous.

The District Court considered evidence in six areas by City appellants as establishing an intent to maintain and operate a segregated school system. To demonstrate that the evidence

fails to establish such an intent and that the Court therefore erred in reaching its conclusions City appellants will review each category in the same order as the District Court.

The issue is whether the evidence establishes that the City appellants maintained a *de jure* segregated or dual school system so as to deprive minority students equal opportunity to a good education and thereby deny their right to the equal protection of the law as guaranteed by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 [1954].

Since few northern city school districts, like Buffalo, maintained separate minority school facilities under specific legal requirements or options imposed or created by positive state law, additional standards were laid down by the Supreme Court to guide the Courts in their review of claims of *de jure* rather than *de facto* segregation in northern school districts. Thus in *Keyes v. School District No. 1*, 413 U.S. 189 (1973) the Court established the following test:

“ . . . a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that the other segregated schooling within the system is not adventitious.” (*Keyes*, at 208)

Such a presumption establishes a “prima facie case of unlawful segregative design on the part of school authorities” and “shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregated actions.” *Keyes*, at 208.

A school board can rebut a presumption against it either by showing that “segregative intent was not among the factors that motivated [its] actions”, or that “its segregative acts did not create or contribute to the current segregated conditions.” *Keyes*, at 210-11. The Supreme Court has also “suggested”

that there is no violation where "... the relationship between past segregative acts and present segregation [has] become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." *Keyes*, at 211.

It is City appellants' position that a thorough and objective review of all the evidence will show that the plaintiffs failed to establish any such *prima facie* inference of segregative intent affecting a substantial portion of the BPSS. Alternatively, if any such inference can be made, it was successfully rebutted by the City appellants. In either case, the Court's findings and legal conclusions were clearly erroneous and reversible.

City appellants' contend that to the extent significant racial imbalances occurred within the BPSS, they were the results of changing neighborhood housing patterns and their resulting impact upon neighborhood school boundary lines long ago established and maintained in a racially neutral fashion.

For example, the plaintiffs' own evidence shows that in general as the City's total population has declined, the percentage of minorities residing in Buffalo has increased (PX 229, 263; Appendix at p. 120, fns. 12, 13). The Court itself cited at reasons for this social phenomenon (Appendix at p. 1201, fn. 14) higher minority birth rates, suburban exodus of majority families and disproportionate enrollment of majority students in private and parochial schools. The impact of these factors upon the public school system can be easily seen. Between January 1966 and October 1973 the elementary school population in the BPSS declined by approximately 11,000 students. But the percentage of minority students in the elementary schools increased in this same period from about 36% to 46%, while the percentage of

majority students declined from 65% to 55% (PX 6 at 19; Appendix at p. 1202, fn. 16).

The effect of these undeniable social trends upon the proof in this case is quite dramatic when contrasted to the District Court's analysis of the six areas of conduct by appellants relied on to support its conclusion.

First, few, if any, of the acts alleged by plaintiffs and referred to by their witnesses antedate 1964, the year when the State Commissioner of Education found the BPSS to be *de facto* segregated. Since the Board had maintained the neighborhood school patterns from the beginning of the school system, it follows that the racial imbalances existing in 1964 were the result of factors beyond the control of the City appellants.

Second, the plaintiffs' testimony and the stipulations established that 21 of the 77 elementary schools were predominantly minority. Yet, of these 21 only eight schools were specifically pointed to by plaintiffs as examples of where policies or actions of the City appellants allegedly contributed to the racial imbalance at these schools. This fact shows that social causes over which the City appellants had no influence were dominant in establishing the racial character of the elementary schools.

Plaintiffs focus on eight schools to show discrimination by the Board caused racial imbalance. Four of the schools—Nos. 17, 4, 16, and 54 are dealt with elsewhere in the brief. As to Schools 31, 39, 62 and 75, census tract data clearly establishes that the racial makeup of those schools is the result of dramatic changes in the racial character of their respective neighborhoods (Appendix at pp. 1756-1757).

As was said in *Higgins v. Board of Education of City of Grand Rapids*, 508 F.2d at 791 (6th Cir., 1974):

"It is thus seen that the law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control. Neither are they operating a dual system when they fail accurately to anticipate the full effect of their racially neutral retention of a neighborhood school system, absent a finding of segregative intent."

A. East High School

The District Court found the Board of Education guilty of segregative intent with respect to the redistricting of the East High School district and the deletion of special languages from East's curriculum in 1960 and the subsequent language transfers (Appendix at p. 1079). The Court erred in these conclusions because (1) the evidence clearly does not support the finding that any boundary changes made by the Board adversely affected the racial composition of East, and (2) the language transfers did not cause East to be a predominantly minority school.

The evidence that the Court relies upon regarding district changes at East High School are the stipulations numbers 151-156 (Appendix at p. 1064).

It must be stressed that in 1950, East High School was an almost all-white school servicing an almost all-white neighborhood (Appendix at p. 1068). This fact must be considered when the evidence relied upon by the District Court is analyzed.

Stipulation 151 states that:

"1. The Board in May 1954 adjusted the East district so that students residing in an optional area in the eastern sector of the district would thereafter not be given the option of attending East. The students in this optional area were 'practically all white.' " (Appendix at p. 1064)

This area had not been assigned to East, but was an option zone between East and another school. This meant that the students could attend either school without having to obtain special permission to do so (See Option Zones, *infra*). There is no evidence introduced to show how many students in this area had been attending East.

Stipulations 152 and 153 state:

"2. Another district adjustment by the Board at this time extended the East district further south. The result of this was that some black students were required to go to East instead of the predominantly white South Park High School. (S-152).

3. Three years later, in May of 1957, another redistricting for East was authorized by the Board. This changed an area then optional to Grover Cleveland, Bennett and Lafayette High Schools to East's district. Most of the students in this formerly optional area are black. (S-153)."

There is no evidence as to the number of black students affected by these changes or the effect upon East High School. East High was not a racially segregated school in the mid-1950's (Appendix at p. 1068).

Finally, the Court refers to Stipulations 154-156 which state:

"4. At that same Board meeting, graduates of School 43 were assigned to South Park High School. School 43 students were predominantly white and the school was just as close to East as to South Park. (S-154-156)." (Appendix at p. 1065)

The evidence shows that in 1951, the area referred to was made an optional zone between East and Kensington High School (Appendix at p. 1065). This was done at a time when East was almost all majority students, thereby negating any

inference of racial intent (Appendix at p. 1065). In 1954, when this area was made part of the Kensington High School District, East High School was still a predominantly white school and there is no evidence offered to suggest how many students from this optional area had attended East in 1951-54. The transfer of this area in 1957 from Kensington to South Park had no effect upon East.

It cannot be concluded from this evidence that the Board of Education in any way manipulated the East High School district with the intent to segregate that school.

The District Court relied heavily upon language transfers from East High to impute segregative intent to the Board, but failed to demonstrate that this policy substantially contributed to the racial imbalance at East High School.

The language transfer policy was designed long before this case to enable students to take advantage themselves of language courses not offered in their school. As noted by the District Court, it was the practice that certain "special" languages such as Polish, Italian, Hebrew and Russian are only offered at some high schools.

The Court places great emphasis upon the 1960 Board's decision to discontinue the Polish language offering at East High School as indicative of a racial motive to segregate the school (Appendix 1069, 1079). The Court first took judicial notice in its opinion of the "fact" that the East High School's attendance district was populated by substantial numbers of Polish-Americans (Appendix 1069). The Court's statement that defendants did not dispute this is true because defendants never had such an opportunity, the Court, having given no notice of its intent to take judicial notice of this fact. This was plain error.

The Court's facile assumption is that but for the discontinuance of Polish at East, substantial numbers of white students would have attended that school but in fact transferred to other schools where Polish was offered (Appendix 1069). But no evidence shows how many students were enrolled in Polish language courses at East prior to 1960. Therefore, there is no basis for the Court to conclude that the discontinuance of the language was purposely designed to induce Polish-American students to transfer elsewhere to take this course. The Court refers to the testimony of Mr. Girard to establish this connection (Appendix 1205 at fn. 25). But the transcript of Mr. Girard's testimony shows he was only referring to the period after 1965 (Testimony, Vol. III, at 201-202). Thus, there is no evidence to infer that a substantial number of students would have attended East between 1960 and 1965 but for the Board's decision to discontinue the Polish language course in 1960, a year when the school was already identifiably black.

Other evidence suggests more persuasively what was occurring at East High School. Defendants' Exhibit 8 (Appendix 1774) shows that from 1966 to 1973 relatively few transfers of either black or white students occurred and in some years more blacks than whites transferred out of East. The census tract data at Appendix, page 1755 shows that between 1950 and 1970 in many of those areas general within the East attendance district, the racial makeup was changing dramatically to predominantly minority neighborhoods. The relevance of this census tract data is also illustrated by the material at Appendix, pages 1775-79 which shows the changing racial composition of neighborhoods adjacent to the elementary schools which supply students to Clinton Junior High School, Woodlawn, Genesee-Humboldt, and Schools 31, 37 and 44, which in turn provide students for East High School.

The insignificance of Polish language transfers upon the likelihood of more white students attending East so as to avoid its predominantly minority character of the school is shown by the fact that in 1972, when the transfer policy was revoked, only 48 of 390 eligible majority students were required to attend East. Court proceedings had to be instituted against the parents of many of these students to compel them to enroll their children.

Assuming, for the sake of argument, that some finding of discriminatory intent can be made regarding East High School, appellants submit that in a school system of over 50,000 students, the Board's policy could not have affected a substantial portion of the school system as required by *Keyes*.

B. Woodlawn Junior High School

In its discussion of the siting of Woodlawn, the Court notes from the evidence presented that the junior high was proposed to alleviate the severe overcrowding of the elementary schools in the Masten District (Appendix at p. 1081). This condition of overcrowding was caused in substantial part by a great influx of black families into the district (Appendix at p. 1081).

The District Court did not find the Board guilty of segregative intent with regard to the siting of Woodlawn although the Court stated that "(T)here was evidence tending to show that this siting of the new junior high school guaranteed that it would be segregated because potential feeder schools mentioned at that time were predominantly black."

In *Higgins v. Board of Education of City of Grand Rapids*, 508 F.2d 779 (6th Cir., 1974) p. 785, the Court of Appeals held that the District Court had not erred in "refusing to find

improper the school board's decision to retain the concept of a neighborhood school system in meeting the needs of a growing population". The Buffalo Board of Education adhered to this same philosophy in the location of Woodlawn, yet the District Court found the Board was motivated by a discriminatory purpose in districting the school to serve the neighborhood in which it was built.

The District Court cites as support for its conclusion the fact that other districting plans were proposed by various Board members. These plans purported to provide racial ratios reaching 64-36 white majority (Appendix at p. 1088). The proponent of this plan, Dr. Wright, did not show that this plan would alleviate the overcrowding in the schools which was the reason Woodlawn was built.

Dr. Wright's plan, if put into effect, would have been a radical departure from the neighborhood school concept and there simply was no popular support from either the black or white community for such a school district (Testimony, Vol. III, pp. 183-191). The District Court also refers to a statement by Dr. Manch made during discussion of the districting proposal, in which he stated:

"[I]t is not now feasible, from the point of view of sound education and administration, in view of everything that has happened, in view of all the factors, it is not now feasible, I believe, to draw the district lines for Woodlawn in such a way as to achieve a racial balance that would be meaningful or stable. I don't think there is any middle ground in it anymore." (Appendix at p. 1090).

Dr. Manch expressed concern over the Board's ability to create a "meaningful or stable" racial balance at Woodlawn. Although it is true that a school board cannot maintain or create segregated facilities in order to placate the local com-

munity, *Spangler v. Pasadena City Board of Education*, 311 F. Supp. 501, 525 (C.D. Calif. 1970), a genuine concern for "white flight" has been recognized by the Court in *Higgins, supra*, as a valid concern, and not evidence of segregative intent where voluntary desegregation measures are being considered (*Higgins, supra* at 793-94).

The inability to achieve a stable, proper racial balance in this school is illustrated by the actual results at Woodlawn. Although the final district boundaries did extend across Main Street into a predominantly majority area, the school still opened as 99% minority. The District Court attributes this result to the creation of an option zone for a portion of the district. There is no evidence offered to show the number of students affected by the option zone and its effect upon the racial makeup of Woodlawn. The stipulations relied upon state only what the option was.

The plaintiffs failed to create under the *Keyes, supra* standard, a *prima facie* case of racial intent as regards the Woodlawn boundary line. The Court completely disregarded the undisputed demographic facts in areas surrounding Woodlawn's feeder school districts which more than adequately explain the reason for the all black compositions of these schools, and thus Woodlawn.

Having found that no segregative motive was involved in the siting of Woodlawn, the evidence relied upon by the Court to find that the districting decision was based upon discriminatory consideration is simply unpersuasive. The evidence also tends to show the practical inability of the Board to have affected the racial composition of the school by artificially imposed boundary lines. The assumption underlying the Court's finding seems to be that the Board had an affirmative duty to integrate a school they should have

realized would become predominantly minority because of local housing patterns. The Court claims the Board's failure to act accordingly is evidence of segregative intent. This again is not the law and is another example of the Court's invoking an improper legal standard to infer intent against the Board of Education. Its finding is, therefore, clearly erroneous.

C. Transfers and Optional Zones

1. Transfer Zones

The District Court states that the Buffalo Board of Education's transfer policies *per se* are not discriminatory (Appendix at p. 1103).

The Director of Student Personnel testified that the transfer system was formulated for the welfare of the students (Vol. VIII, p. 99).

A transfer is an exception to the general rule that each pupil is to attend the school which is located in the geographical zone in which he lived. The Court listed the major reasons for which transfers are granted on Page 58 of its Decision and Order:

- 1) Special courses not offered at pupil's own school
- 2) Medical necessity—physical and psychological
- 3) Hardship
- 4) School adjustment
- 5) Harassment
- 6) Voluntary integration

(Appendix at p. 1095).

These six considerations give the Board the flexibility which the Court itself stated is necessary for a system of this size (Appendix at p. 1103).

Of course, transfer policies cannot be used to camouflage a deliberate effort to maintain a segregated school system.

The plaintiffs failed to produce any evidence that the transfers questioned at trial were racially motivated. The Court pointed to no specific evidence to justify its finding, either that the transfer policies attacked by plaintiffs were racially motivated or that such transfers affected a substantial portion of the school system.

The evidence before the Court shows that a minimal number of transfers have been granted by school personnel in violation of Board policy. Therefore, to impute a segregative intent to the Board for these violations of its own policies is completely illogical and has no evidentiary basis whatever.

Judge Curtin placed heavy reliance upon stipulation No. 60 in his attempt to show that the transfer policy of the defendant Board of Education was racially motivated.

Stipulation No. 60 states:

"60. That the practices in administering transfers by both the office of Pupil Personnel Services and principals of various schools, and the language transfers, have resulted in from 2,000—4,000 white students annually attending schools outside of their districts thereby contributing to the higher percentage of black students in various schools, including Schools 54, 16, Fillmore Middle, Genesee-Humboldt, Woodlawn, East High School, all of which have black student populations of at least sixty percent at the present time." (Appendix at p. 101).

This stipulation standing alone does not infer the required intent. Neither does it in any way make clear to what extent the use of the transfer system actually contributed to the racial imbalance in any of the six specific schools of some 96 existing in 1973-1974. Nor does the stipulation in any way suggest over what period of time these transfers occurred.

These gaps are critical because racial imbalances had already existed in all of the schools mentioned in the stipulation as in 1965. For example, School No. 16 in 1962 was already 61 percent minority (Appendix at p. 1099, Table 10); Woodlawn Junior High was 99 percent minority when it opened in 1964 (Appendix at p. 1208, fn. 35); and East High School was 52 percent minority in 1960 (Appendix at p. 1206, fn. 28). It was 90.1 percent minority in 1966 (Appendix at p. 1356).

If foreseeable effect is of any relevance in inferring discriminatory intent, the only inference supported by plaintiffs' evidence is that schools already racially identifiable because of changing residential patterns increased these imbalances.

The Court's treatment of the Board's transfer policy holds it culpable for allowing six of 96 schools to become more racially imbalanced as an incidental effect of a properly administered transfer policy.

There is no evidence to demonstrate that school officials maladministered the transfer program. To the contrary, there is evidence that the Board made special efforts to prevent parents from using transfer privileges to avoid integrated schooling. In addition, the Board clearly proved that such intent was not among its motives in retaining and administering its transfer program. This program neither created nor contributed to the segregated conditions of the school system. Any adverse racial affect was attenuated because of private decisions changing residential housing patterns.

Therefore, under *Keyes* the plaintiffs failed to establish a *prima facie* case of segregative intent and the Court's finding here was clearly erroneous.

The fact that certain transfers may arguably have had some impact or effect on the racial composition of the schools af-

fect is in itself not a proper foundation for an inference of segregative intent (See *Village of Arlington Heights v. Metropolitan H.D. Corp.*, U.S., 45 U.S.L.W. 4073 (Jan. 11, 1977); *Washington v. Davis*, 426 U.S. 229 (1976). To establish the required *prima facie* showing of segregative intent, the plaintiffs were obliged to prove and the Court must find that an "... invidious discriminatory purpose was a motivating factor ..." in the official legislative or administrative decision attacked. *Arlington*, *supra* 45 U.S.L.W. *supra* at 4077. The Court's criticism of the Board's transfer policy fails to satisfy this standard.

During the time period covered by the transfer evidence, the school system pupil population was approximately 60,000. Annual transfers ranged from two to four thousand.

All of these transfer records were available for scrutiny by the plaintiffs. The plaintiffs chose to bring only seventy transfers to the Court's attention.

The District Court surmised that "many" of the seventy had an effect on the racial balance of the schools (Appendix at p. 1097). Such supposition was unwarranted given the slim evidence before the Court. The Court states that the transfer policy increased segregation in "many schools in Buffalo" (Appendix at p. 66). The Court does not indicate how many or which schools.

Two schools are cited by the Court to support its finding on official discrimination (Appendix at pp. 1100-1103). The criticism of the Court seems to be that despite the fact that the areas served by the two schools were separated by railroad tracks and that the schools were always considered as one for administrative purposes, that the Board's failure to consolidate the student population into the newer of the two shows a discriminatory purpose. There is no authority for

such a process of inference. The racial composition of the two schools, the Court agreed, generally reflected the neighborhoods served by each school (Appendix at p. 1102). But the Court passes over this fact and instead focuses on some evidence that a principal of the schools may have granted some transfers as a convenience to some parents (Appendix at p. 1102). Appellants respectfully suggest that such an interpretation of the evidence is insufficient to impute a segregative intent to the Board. To cite an isolated occurrence in order to condemn a long standing general policy is to commit the classical fallacy of "ab uno disces omnes." More clearly, such "evidence" cannot support the Court's sweeping inference that all the transfers were racially motivated.

Three other elementary schools were cited by the Court in the course of its discussion on transfer policy—Nos. 16, 30 and 38 (Appendix at pp. 1097-1100). Although there are racial imbalances in these schools, the Court makes no effort to attribute such imbalances to racially motivated and officially condoned transfers.

Important to note is the fact that schools with large racial imbalances were in such a condition in 1964. The plaintiffs' evidence of alleged racially motivated transfers was confined to the period of 1968 to 1973. City appellants submit that it cannot be inferred that the transfers in question could have had any great effect upon the substantial racial imbalance that already existed in 1965. The plaintiffs thus failed to establish any substantial causative effect between the allegedly improper transfer policy and the racial imbalances pointed to by both plaintiffs and the Court as evidence of a dual school system. Nothing in this record suggests that the transfer policy was administered in a racially discriminatory manner, particularly prior to 1965, or that it had any substantial effect in creating racial imbalance in Buffalo public schools.

The Court cited a few transfers where the specific reason stated on the transfer form for granting the transfer were fear of black children and avoidance of Woodlawn Junior High School (Appendix at pp. 1096-1097). The remaining requests discussed during the trial cited legitimate reasons for the transfers requested. Examples are the doctor's excuse (Appendix at p. 656) and the hardship case where parents wanted older children to be able to walk the younger children to school (Appendix at p. 625).

Contrary to the Court's statement, the Director of Student Personnel did not admit that "transfers were granted white students to avoid predominantly black schools." (Appendix at p. 1104). When asked if he suspected that the real reason behind many transfers was that the children did not want to attend school with blacks (Testimony Vol. VIII, p. 105), Mr. Girard responded affirmatively, but also stated that "they gave a valid reason."

The plaintiffs cited instances where parents abused the transfer system to transfer their child from a predominantly minority school. Regardless of parental motives, it is undisputed that school personnel tried to prevent any such abuse of the system.

The Court infers that Board personnel were under an obligation to thoroughly investigate every application for a transfer that was valid on its face. This is obviously not the law and is patently impractical. To follow this policy would have been to prohibit any transfers at all, thereby destroying all flexibility in the system. The personal but undisclosed motives of individual majority parents should not and cannot be attributed to the Board of Education. To the contrary, the opinion in *Arlington Heights, supra* strongly suggests that only the contemporaneous statements of Board members them-

selves are relevant in determining whether a discriminatory purpose was a motive for that challenged decision (*Arlington Heights, supra* at 4078). The statements of independent private third parties are conspicuously omitted by the Supreme Court as relevant evidence for this purpose.

There are few judicial guidelines for the evaluation of pupil transfers as evidence of segregative intent in desegregation cases. But a comparison of the evidence in this case on this issue to the recently decided case of *United States v. School District of Omaha*, 521 F. 2d 530 (8th Cir., 1975) is instructive. In the *Omaha* case the Court of Appeals found the defendant school district's transfer system to be evidence of a segregative intent. But quite unlike the approach taken by the Court below, that Court looked to the school board's utter failure to require parents to submit any rational justification for such transfers. Prior to 1964, the Omaha transfer system was similar to that of the Buffalo Public School System which allowed transfers only for health or hardship reasons. This policy was replaced by a new policy in 1964. The new policy "allowed any student to transfer if: (1) the student's achievement level was at least equal to the average achievement level of the receiving school; (2) the receiving school was not overcrowded; (3) the student's parents provided the transportation; and (4) the request was a formal one." *U.S. v. Omaha, supra*, p. 539. Thus, under the post-1964 system, no reason for transferring was necessary. The Court further noted that the receiving school capacity limitation was seriously ignored. *U.S. v. Omaha, supra*, p. 540, Footnote 20.

It is significant that the Court of Appeals in *Omaha* implied that in the absence of evidence to the contrary, a transfer policy similar to the Buffalo Public School System's policy is not a valid basis for implying improper intent and that it is

only the conduct and motives of the school board and not that of the parents which is a proper subject for judicial scrutiny (need cite).

The evidence in the present case is in no way comparable to that of the *Omaha* case and does not support Judge Curtin's finding of segregative intent. In evaluating the evidence presented, the District Court looked only at the numbers of transfers granted from a particular school and the effect that these transfers purported to produce. The Court did not find that all or most of these transfers were granted for "spurious or racially motivated reasons". Rather, it looked only at the effect or impact of the transfers (Appendix at pp. 1100 and 1104). *Washington v. Davis, supra*, made it clear that the impact or racial effect of a policy is not a sufficient basis upon which to find liability absent a showing of discriminatory intent (*Washington, supra*, at 48 L.Ed. 2d 597).

Again, in total contrast to approach taken in *Omaha*, the District Court completely failed to show any substantial impact upon the racial composition of any of the schools in question or upon the conditions of *de facto* segregation that had already existed in 1965. Therefore, even if impact or effect were properly used by the Court as a test for segregative motive, that test was failed as regards a major element in the Court's finding.

Therefore, in using the Buffalo Public School System's transfer policy to bolster its conclusion that the defendants' school system was segregated, the District Court erred in three respects: (1) in predicated a finding of segregative intent upon insufficient evidence; (2) in attempting to impute parental motives and conduct of third parties to the school board; and (3) in predicated a finding of segregative intent upon alleged disproportionate racial impact.

2. *Optional Zones*

The Court's finding of segregative intent to the Buffalo Public School System's option zones is clearly erroneous in that (1) the Court applied an improper standard in reaching its initial determination, and (2) the evidence does not support the Court's conclusion after reconsideration of the case.

The District Court noted six instances of optional zones in the Buffalo Public School System (Appendix at pp. 1105-1106). All of these zones, except the portion of Woodlawn Junior High School (discussed above), were created sometime in the 1950's. The Court did not find, nor was any proof introduced to indicate, that the Board created these option zones for discriminatory reasons. To the contrary, the Court cites the 1963 Civil Rights Commission Report which ascribed the origin of these optional zones to "tradition" (Appendix at p. 1109). These zones were created whenever a school became overcrowded. Their purpose was to relieve the overcrowded conditions (Record, Vol. VII, p. 102). There was, therefore, no segregative intent as a basis for the formation of these zones. To the contrary, the only reasons, according to the plaintiffs' own evidence, were educationally sound and proper ones.

The Court found that the School Board's failure to abolish the system was segregatively motivated because "the segregative results of the optional areas policy were, under the *Hart* test, clearly foreseeable" (Appendix at p. 1109).

The Court's finding of "clearly foreseeable segregative results" is not the proper standard to be applied in light of *Washington v. Davis, supra*, and its explicit application to school desegregation as mandated by the Supreme Court's disposition in *Austin Independent School District v. United States*, U.S., 45 U.S.L.W. 3413 (Dec. 7, 1976).

In response to defendants' motion that the District Court reconsider its decision in light of the recent Supreme Court decisions, Judge Curtin reaffirmed his findings with respect to transfer and optional zones by referring to a standard established by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, U.S., 45 U.S.L. W. 4073 (Jan. 11, 1977.) (Reconsideration Op. at p. 16). The Court stated that "procedural and substantive departures from the norm are sometimes probative of racial intent." The Court then found the transfer policy and optional zones to be examples of such procedural and substantive irregularities and, therefore, found the evidence sufficient to support a finding of discriminatory intent. The portion of *Arlington* relied upon by the Court states:

"The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey*, 387 U.S. 369, 373-376 (1967); *Grosjean v. American Press*, 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 45 U.S.L.W. at 4077 (Jan. 11, 1977).

A close examination of this passage indicates that the Supreme Court was concerned with sudden departures from the normal procedures which are directly causative of the challenged decision or policy. That is not at all the situation as to the option zones in this case.

The optional zones in the Buffalo Public School System were not recently created procedural departures from the norm. They were all instituted at least prior to 1957, and again the Court did not find that there was a segregative intent in the creation of these zones.

Failure to discontinue this practice was not a variance from the usual procedure but rather a continuation of past practice. The Supreme Court stated that procedural and substantive "departures" may be relevant and "might afford evidence that improper purposes are playing a role" (*Arlington, supra*, p. 4077). Since the Court did not rule that these departures are conclusive evidence of intent, they should not be considered determinative.

The Court's assertion that the use of such option zones by majority students and parents to avoid predominantly minority schools is an example of a procedural irregularity sufficient to meet the stricter standards of *Arlington*, is completely at variance with the record and the Court's original finding that this policy was predicated on "tradition" (Appendix at p. 1109). It only tends to show the Court's heavy reliance upon foreseeable impact as a basis for inferring a discriminatory purpose regarding the schools' use of certain option zones.

The evidence presented in the instant case on the issue of optional attendance zones does not support a finding of discriminatory intent. There is no evidence cited by the Court that illustrates how many pupils were involved in such options. The Court quotes only from a stipulation which states:

"... maintenance of the optional zones has contributed to racial separation and isolation in the Buffalo public school system." (Appendix at p. 1107).

Apart from the fact that such a generalized statement has little, if any, probative value, the Court's use of it begs the question. The issue is not whether the use of such optional zones contributed to racial separation but whether such use was motivated by a discriminatory intent. Again the Court reveals that contrary to assertions in its opinion on reconsideration, it was the foreseeable impact or effect test that prompted the Court's original finding on this vital issue and nothing in the reconsideration ruling persuades otherwise.

It is also apparent that the stipulation in no way suggests that the defendants agreed that the "contribution" was extensive or serious or had any significant effect. All elementary school optional zones were abolished by the Board in 1972 (Appendix at p. 39).

The District Court cited *U.S. v. Omaha*, 521 F. 2d 530 (8th Cir., 1975), in support of its original finding of segregative intent. In that case, quite unlike Buffalo, the optional zones were all originated from 1964-1968 as part of a plan to convert to a junior high system (*Omaha, supra*, at 541). The Court in *Omaha* considered statistical evidence presented to it which showed the number of students affected by the policy in a certain year and the subsequent effect upon the schools. Absent similar specific findings of fact in this case, the Court below was clearly erroneous in finding segregative intent with regard to the Buffalo Public School System's optional zones.

D. Vocational-Technical High Schools

The Court's conclusion that the appellant school Board had intentionally segregated students in its vocational and technical high schools was clearly erroneous.

There are six vocational-technical high schools in the City of Buffalo which have no established attendance areas. Pupils

from throughout the City apply at whichever school has the program he or she is interested in. As noted by the Court (Appendix, at p. 1115), Fosdick-Masten is the only all-female vocational high school and the only one where traditionally female oriented vocational courses, such as cosmetology, are offered. The District Court was asked to take judicial notice that the remaining five schools at the time in question were all-male schools.

These vocational schools are not segregated. Of the six schools, two are racially balanced (44.0 and 45.6% minority), while the remaining four are admittedly racially imbalanced but still substantially integrated considering the voluntary nature of the admission procedure (Appendix, at p. 1357). In 1973 the racial composition of the respective vocational high schools was:

| 1973 SEPT. | | |
|----------------|------------|------------|
| SCHOOL | ENROLLMENT | MINORITY % |
| Burgard | 1,103 | 45.8% |
| Emerson | 560 | 44.0% |
| Fosdick Masten | 587 | 98.1% |
| Hutch-Tech | 1,125 | 19.8% |
| McKinley | 1,157 | 20.3% |
| Seneca | 1,113 | 20.0% |

Source: PX 6 at 23, Appendix at p. 1357

The plaintiffs alleged and the District Court found that the discriminatory actions of the Board of Education with regard to admissions at vocational-technical high schools caused segregative conditions at these schools. The evidence cited as a basis for this conclusion clearly does not support this finding.

Its fundamental error here as in the other areas discussed above is that the Court persists in equating mere racial imbalance with an intentional discriminatory policy.

The Court states that prior to 1972, the admissions criteria for these schools consisted of elementary school grades, a personal interview and sometimes an additional entrance test (Appendix, at p. 1112). An additional test was required at one specific school, Hutchinson Central Technical. The Board's policy regarding admission to these schools is clearly neutral on its face.

That the school system used an entrance examination to aid in the selection process which resulted in a disproportionate number of majority students being admitted to certain schools is not a basis for inferring a discriminatory purpose (*Washington v. Davis*, 426 U.S. 229 [1976]).

The Court quotes the testimony of Mr. Gardner, the former Board president, in which he states that in 1971 he concluded that "the policies of admissions to vocational and technical schools were being operated, to the Board's knowledge, in a manner which was discriminatory against black applicants." Mr. Gardner makes it clear in his testimony that it was never the Board's policy to discriminate against black students in their admissions policy. Mr. Gardner states (Appendix, at p. 385):

"A. The stated policy of the Board surely was not discriminatory. (Emphasis added).

B. How about the policy, other than the stated policy, was there a policy about—

A. I can't say the Board had a discriminatory policy. What I am saying to you is that, as with many policies, sometimes the implementation varied from the intent."

Mr. Gardner explained that his investigation revealed that,

"in the cases where the interview was the critical factor, the subjective standards that were applied by the interviewers varied in some occasions according to the pre-

conceived thinking of the interviewer with respect to the desired racial composition of the entering class." (Appendix, at p. 384).

It must also be clear that the testimony of a former school board president called as a plaintiff's witness cannot be considered as an admission of any kind by the Board or any of its other members, officers or employees.

It is not shown in the record that the Board of Education had actual knowledge prior to June, 1971, of the fact that individuals were discriminating against minority students while implementing the Board's racially neutral admission policy. When Mr. Gardner presented his findings to the Board of Education in June of 1971, the Board immediately took action. A committee was formed to investigate the acts of individuals who were administering the Board's policies. In February 1972, the procedures were revised to eliminate admissions interviews and most entrance tests.

The appellant Board and its members maintained that the impact of the implementation of the admissions policies by these individuals was insignificant. There is no proof offered to show how many students were affected by such a practice. The Court below dismissed this argument by citing the statistics showing the racial imbalance existing in some of the vocational schools. Such statistics are not sufficient to show that any actions by the Board or its staff caused these results. The fact that the racial balance in the vocational schools did not significantly improve after the admission procedures were changed (Appendix, at pp. 560-70, Appendix, at p. 1114) supports the conclusion that other factors have had a significant impact on the racial composition of these schools. One factor which must be considered is that each of the vocational schools has a special area of study which is unique to that building. Mr. Gardner explained to the Court in Vol.

2, pp. 124-126 (Appendix, at pp. 395-397) that in addition to commonly offered academic subjects, one school offers graphic arts, while another offers automotive mechanics, and Hutch Tech offers advanced mathematics and computer training. Obviously, the vocational interests and corresponding choices of the individual students would be a significant factor.

The Court uses Fosdick-Masten's 98% minority enrollment to illustrate the impact that a restrictive admissions policy at Hutchinson-Technical or McKinley had on the entire system. However, since Hutchinson-Technical and McKinley were all-boys schools and Fosdick-Masten was an all-girl school, the admissions policy at Hutchinson-Technical or McKinley could have no effect on the racial composition of Fosdick. Mr. Gardner testified that there were virtually no white applicants at Fosdick (Appendix, p. 397), which clearly shows that the racial imbalance at the school was not caused by any policy of the Board of Education. The only possible way the Board could have racially balanced that school would have necessitated changing the entire vocational school system and to offer a mixture of courses at Fosdick. This type of "fruit basket upset" is not required, and therefore no invidious motives can be imputed to the Board for its adherence to its vocational school policies. See *Higgins v. Board of Education of Grand Rapids*, 508 F. 2d 779, 790 (6th Cir., 1974).

The evidence in the record clearly does not support the Court's finding that the Buffalo Board of Education segregated its vocational high schools.

It is significant that throughout the testimony on this point, no effort was made by plaintiffs to establish in any way the extent to which the racial imbalances may have been caused by whatever improper conduct led to the 1972 school board committee's recommendations.

In sum then, the Court's finding of discriminatory intent on this branch of the case is clearly erroneous for two reasons: One: The pre-entrance examinations were not shown to have been administered in a discriminatory fashion. The plaintiffs' testimony from Mr. Gardner and Mr. Francis (Appendix, at pp. 560-565) was generalized and lacking in any specifics; it was hearsay/opinion testimony. The thrust of this testimony was that because of the racial imbalance discovered the examinations must, perforce, have been discriminatory. This is not a permissible basis for finding discriminatory intent. *Washington v. Davis, supra*. Two: There is no specific testimony establishing any significant discriminatory conduct on the part of school officials relative to the interviews which were also part of the earlier admission procedure. Again, the testimony here was vague and generalized. The fact that the Board acted to change the admissions procedure in the light of criticism from the Department of Health, Education and Welfare, is not an admission that a constitutional violation occurred.

In reviewing the Court's findings of a segregated school system as regards the vocational and technical high schools, it is also important to consider the circumstances of the academic high schools. In addition to the six vocational high schools, there are in the Buffalo Public School System seven academic high schools. Only one, East, is predominantly minority. The remaining six are integrated and four of the six are racially balanced. This is an uncontroverted fact (see Exhibit No. 6). Unfortunately, it is also completely ignored by the District Court in its determination to establish a dual system. But it cannot be ignored since 66% (Appendix at pp. 1356-1357) of the total high school population attend the academic high schools. The fact that the Board has maintained a substantially integrated high school program surely tends

to negate any inference of a discriminatory purpose as is sought to be done by the Court.

E. Staff

Assignment

The District Court erred in finding that faculty and staff in the school system were segregated and that this segregative condition was the result of racially motivated policies and practices of the Board.

The Court was in error when he equated the racial imbalance of the faculty in the Buffalo system with the segregation of the faculty that existed in the Southern School District cases, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Davis v. Board of School Commissioners*, 402 U.S. 33. In those school districts all black schools had all black or virtually all black staffs and not just imbalance in certain situations as found in Buffalo.

The Court compounds this basic misconception of Supreme Court decisions by inferring the prerequisite intent to discriminate from the figures which admittedly evidence minor imbalance. This, of course, is an improper method of determining a violation and made clear by *Washington v. Davis*, *supra*. To buttress its legal position, the Court cites cases that are specifically overruled by *Washington v. Davis*, *supra*, *Crockett v. Green*, 388 F. Supp. 912, 917, and *United States v. Lathers International Local 46*, 471 F. 2d 408, 414 (2d Cir. 1973) (Appendix 1129-30).

To further support its finding of discriminatory assignments in faculty, the Court said the testimony of Eugene Reville admits this (Appendix 1124). In actuality, Mr. Reville stated that such assignments were educationally sound, in his opinion, but the Board's policy was to the contrary (Appendix 1210).

In addition to the above, the Court ignores the testimony by Mr. Connors that transfers of teachers were granted pursuant to contractual obligations and long-standing policies on the basis of seniority. Right or wrong, such contractual obligations and long-standing policies indeed negate any inference of intent to be drawn from the statistics above.

Recruitment

The Court made the same basic errors in regard to staff recruitment as the errors assigned above. The statistics produced at the trial evidence imbalance but not segregation of the type condemned in *Charlotte* and *Davis*. In addition, there is no evidence to support a finding of discriminatory intent. To the contrary, the District Court's opinion is crystal clear that this intent was inferred simply from stark figures, and the cases cited and quotes therefrom establish this beyond a doubt (Appendix 1129-30). This approach suggested by the cases and quotes cited were unquestionably superseded by *Washington v. Davis, supra*.

The Court then acknowledged efforts by the Board to improve the racial imbalance in faculty staff and finds that they did not produce satisfactory results. Again the Court erroneously relied upon the effectiveness test of *Green v. County School Board*, 391 U.S. 430, and its progeny, instead of the discriminatory intent test of *Keyes, supra*, in reaching his finding.

F. State Integration Mandate

The District Court pointed to the Board of Education's and Common Council's actions made in response to the State Education Department's mandate to show a purposeful segregative intent on the part of the defendants. This element

of the plaintiff's case presents utterly no evidence of any segregative intent and the Court's insistence on so utilizing it was clearly erroneous.

Initially, the Commissioner's ruling itself must be analyzed. Dr. James Allen, the Commissioner of Education for the State of New York, determined in the *Yerby Dixon* appeal in 1964 that, the Buffalo Public Schools were racially imbalanced (App. 1737). The Commissioner then used his broad, general powers over education to order that Buffalo submit a plan to alleviate racial imbalance. These broad powers enable the Commissioner of Education to direct that a particular school district take affirmative steps to eliminate racial imbalance within the district, even though the racial imbalance involved does not violate the U. S. Constitution.

The Commissioner's ruling in the *Yerby Dixon* matter [4 Ed. Dept. Rep. 115 (1965)] (App. 1737) determined that the Buffalo Public School System was *de facto* and not *de jure* segregated. In his opinion (Appendix at 1752), the Commissioner specifically found that this condition was not the result of purposeful action by the Board:

"Involved in the ultimate solution to de facto segregation in a school system is, of course, the elimination of segregated housing, slum conditions and other undesirable socio-economic conditions which lie beyond the control of the Board of Education or of the Commissioner."

The Commissioner then issued a directive that the Board adopt a plan for mitigating the problem of racial segregation. This directive was based not upon a constitutional violation by the Board but upon educational policy. It cannot be construed to show segregative intent with respect to the defendants.

The Commissioner's finding of *de facto* segregation in the Buffalo Public School System was reiterated by the District Court in *Offerman v. Nitkowski*, 248 F. Supp. 129 (W. D. N. Y. 1965) when a group of citizens challenged the constitutionality of the plan prepared by the Board of Education in response to the Commissioner's Order. Judge Henderson stated on Page 130:

"Prior to the Commissioner's Order and adoption of the resulting plan, the city of Buffalo schools were operated along neighborhood lines without regard to the racial composition of the neighborhood which a given school might be scheduled to serve. Through the years, socio-economic factors had resulted in a concentration of the negro population of the city which, in turn, resulted in several of the city's schools becoming predominantly attended by negro pupils.

Such a condition, commonly referred to as *de facto* segregation, was and is common under the neighborhood school system in effect in many cities throughout the country."

It was the response to these findings of *de facto* segregation and Commissioner Allen's order which is the basis for Judge Curtin's findings.

The defendants admit that there have been disagreements between the Board of Education and the Commissioner of Education over the scope and soundness of various plans to alleviate existing racial imbalance. City residents and representatives on the Board of Education have seriously questioned the propriety and necessity of broad remedial plans, which include extensive cross-bussing, to correct a situation of *de facto* segregation. The Commissioner has stated and the Court has recognized that the Board of Education has taken steps to remedy this racial imbalance (Appendix at pp. 1153 and 1154). Whether the Commissioner

considered these steps to be sufficient was an issue for the Board of Education and the State officials to resolve. Surely any problems concerning compliance with a state education department mandate to alleviate *de facto* racial imbalance should not be considered as evidence against the defendants when the issue before the Court is whether *de jure* segregation exists in the Buffalo Public School System.

The nature of the disagreements between the Board and the Commissioner had to do with the educational soundness of the various proposals made by the Commissioner to racially balance each school in the Buffalo Public School System. These proposals would necessarily have required the massive cross-district transportation of thousands of students. The Board's own view of the educational soundness of such plans was contrary to the Commissioner's. Also, the Board was concerned about the impact of such plans upon the decision of majority parents to retain their children in the School System. Such concerns for the welfare of the students and potential "white flight" have been specifically held to be proper where a school board declines drastic proposals to achieve artificial racial balance as part of a voluntary desegregation effort (*Higgins v. Grand Rapids*, 508 F. 2d 779 [6th Cir. 1974] at 793-794). Since the Board and the Commissioner were dealing with a *de facto* circumstance, the Board's objections to the Commissioner's proposals and its effort to implement more reasonable alternatives come within the *Higgins* reasoning.

The Court's reliance upon these disagreements over the scope of remedies to deal with *de facto* segregation so as to infer a discriminatory intent also is contrary to establish congressional policy. In 1972 Congress authorized the Attorney General to initiate actions to desegregate public

schools but specifically prohibited district Courts from issuing

" . . . any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance . . . " June 23, 1972, 86 Stat. 375, 42 U.S.C. 2000c-6.

If official federal policy disavows such transportation to correct racial imbalance, it is difficult to understand how a similar policy by the Buffalo Board of Education would be validly used to infer a discriminatory purpose.

The District Court found that the Common Council's opposition to Board integration efforts were "a substantial factor in the continued and increased segregation in the Buffalo Public School System" (Appendix at 1148-1149). Close examination of this evidence reveals that the Common Council's objections to the Board of Education's plans were based upon economic considerations. Commissioner Allen recognized that the fiscal realities would inhibit any major plan to alleviate racial imbalance. In the *Yerby Dixon* decision, 4 Ed. Dept. Report 115, 118, he stated:

"Not only is the problem per se a complex and difficult one in Buffalo, but the Board of Education is handicapped by the fact that it is by law fiscally dependent on the municipal government, and that the city school district is severely restricted by the constitutional tax limitation." (App. at 1752).

Therefore, the evidence before the Court, far from showing a segregative intent, negates any such inference.

Money has been and remains a significant problem in the City of Buffalo, and such economic considerations were repeatedly offered as valid reasons and motivations for the

City defendants' conduct, the Council in particular (See testimony of James Burns, Appendix at 1152).

Other examples of the economic problem included the so-called "stiff opposition" from the Common Council regarding middle schools (Appendix at 1147). The only evidence cited as to this was the lack of funding for the program. The short-lived controversy over the West Hertel Middle School was a similar situation.

A new junior high school was approved by the Council at the site later occupied by West Hertel Middle School before the middle school plan was evolved. The need for the school was to ease the overcrowding at Riverside High School.

When construction of this school was nearly completed, the Board, without consulting the Council, changed the planned junior high to a middle school (Appendix at p. 695). In response to this unilateral change by the Board, the Council temporarily resisted the issuance of bonds to complete the school. Shortly thereafter the Council approved the bonds (Appendix at p. 1613).

The Court pointed to the purchase of Bishop Ryan High from the Buffalo Catholic Diocese as further evidence of the Council's resistance to the Board's integration proposals, but nonetheless concluded that it was without segregative intent (Appendix at 1150).

The Council's adoption of an ordinance requiring that additions to school buildings be of the same material as the school is cited by the Court to show the Council's opposition to desegregation efforts (Appendix at 1146). Whatever intent may be imputed to the Council, the ordinance was soon after declared void by the state courts. The ordinance only delayed the use of portable classrooms, and the record reveals only

scant evidence of racial motives for this abortive legislative act.

The Court concluded in its analysis:

"The Common Council's opposition to the Board's integration efforts has been a substantial factor in the continued and increased segregation in the BPSS. There can be no doubt that its actions were intended to achieve that result." (Appendix at 1149).

The evidence simply does not support this conclusion.

The Council was under no duty to decrease *de facto* segregation by providing money to the Board to remedy racial imbalance. The efforts on the portable classroom and West Hertel Middle School controversy only show that the Council was not active in eliminating *de facto* segregation. It does not show that the Council had caused it or increased it. Both projects were soon effected. The result could not, therefore, have been increased segregation. There is no evidence cited to show purposeful segregative intent by the Council.

Therefore, the inferring of such intent from both the Board's resistance to State Education Department mandates to racially balance all schools in Buffalo and the few instances of reluctant participation by the Council in Board desegregation efforts is clearly erroneous.

POINT IV

The Court's use of evidence related to independent governmental actions as furthering discrimination in residential housing patterns within the City was improper and reversible error.

Throughout its opinion and particularly at section IV-H (Appendix at p. 1170), the Court relies extensively upon the

actions of the United States Government, the Federal Housing Administration in particular, the Buffalo Municipal Housing Authority and the "Real Estate Industry", none of which were parties to the action, to provide a factual basis for a finding of discriminatory intent and, therefore, a segregated school system. This analysis is without legal foundation and further, the conclusions of segregative intent and a dual system thus derived are not supported by the evidence upon which the Court relied.

**The Actions Complained of Cannot be Used
to Form a Basis of the Required Degree
of State Action**

The District Court relied upon activities of the above stated entities to supplement its finding that the racial concentrations in Buffalo's residential housing patterns were not the aggregate result of choices by private individuals but rather that the creation of racial ghettos was directly attributable to the combined policies of the real estate industry, the Federal Government and the Buffalo Municipal Housing Authority. Therefore, in the District Court's view, the Buffalo Public School System's long standing neighborhood school policy could not be considered as racially neutral. Since the segregated residential patterns outlined by the Court were thus in the Court's eyes the result of governmental action, under Fourteenth Amendment purposes, it follows, according to the District Court, that the racial imbalances thereby generated within the respective public schools were similarly inspired by this hybrid form of state action (Appendix at p. 1187).

Further, by applying the animus of racial discrimination to the motives and purposes of these various unrelated public and private organizations, the Court finds that such racial separation within the Buffalo Public School System resulted from state action animated by segregative intentions, thereby

further justifying its conclusion that the City defendants, although separate and distinct from the aforementioned agencies, maintained an unconstitutional school system.

Such judicial reasoning is unsupported in law or fact. To hold the defendant school Board responsible for the conduct of such outside groups and agencies over a period beginning over 40 years prior to trial is clearly erroneous. Such an analysis was invoked in other recent desegregation cases most notably, *Hart v. Community School Board*, 383 F. Supp. 699 (E.D.N.Y. 1974) and *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143 (W.D. Mich. 1973). But the use of unrelated governmental conduct to bolster a finding of state action has not been sanctioned by the Supreme Court* and specific actions cited by the Court below are too insubstantial and remote even if such actions are held to be legally material. In *Milliken v. Bradley*, 418 U.S. 717 (1974) the Court took care to state that it had not relied upon "testimony pertaining to segregated housing . . . [and] accordingly . . . the case does not present any question concerning possible state housing violations. *Milliken*, *supra* at 728 N.7 (emphasis added).

Certainly the unwillingness, if not refusal, of the Supreme Court to rely upon evidence of housing discrimination

*Justice Powell's concurrence in *Austin Independent School District v. United States* is instructive:

"The principal cause of racial and ethnic imbalance in urban public schools across the country—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. *For example, discrimination in housing—whether public or private—cannot be attributed to school authorities.* Economic pressures and voluntary preferences are the primary determinants of residential patterns." (Emphasis added) (.... U.S., 45 U.S.L.W. 3413 [Dec. 7, 1976]).

suggests there is doubt that such reliance is proper. In *Milliken* the degree of alleged state action in causing segregated housing patterns was far more substantial than in the present case.

City appellants also submit that the affirmances of the decisions in *Hart* and *Oliver, supra*, by this Court and the Sixth Circuit respectively, expressly refrained from reliance upon the housing analyses used by the District Courts.

The District Court sought to justify its reliance upon the housing evidence by using it to reject defendants' position that such housing patterns caused the racial imbalances in the school system. Regardless of the Court's rationale, it is clear from its opinion and the plaintiffs' proof that the governmental policies claimed to have caused segregated housing patterns were crucial to both the plaintiffs' case and the Court's findings. For without a linkage between the evidence concerning residential housing patterns and the School Board's educational policies, the Court's other findings of segregative purpose are without meaning. This is so because those factors, addressed throughout the Court's opinion, could not alone account for the degree of racial imbalance in various schools within the system so heavily relied upon by the Court in drawing its conclusion that the entire Buffalo Public School System was unconstitutionally segregated.

This fallacy is especially evident in the Court's analysis of this part of the case. In southern school desegregation cases which operated dual school systems under positive law, school boards were obliged to redraw school boundaries after the *Brown* decision of 1954. But it was usually the case that similar *de jure* segregation existed in housing in such communities as well. Thus, those boards could not create so-called racially neutral neighborhood school districts.

This circumstance stands in dramatic contrast to the situation in northern cities, especially like Buffalo in New York State, that have no history of *de jure* segregation either in housing or schools. Buffalo's public school attendance zones were generally established long before the problem of racial discrimination in either housing or schools became an issue. Thus, it was the gradual change in housing patterns that in turn created racial imbalances in the respective schools and not a policy of the Board of Education to alter attendance zones to lock minority students into certain schools.

It is, therefore, critical that housing arguments relied upon by the Court be carefully reviewed.

The Conduct of the Federal Government

The Court recited certain discriminatory policies of the Federal Housing Administration (FHA) which were promulgated shortly after that program's commencement in the mid 1930's (Appendix at pp. 1170-1172). No attempt was made by plaintiffs or the Court to show whether or to what extent these policies actually affected residential patterns within the City of Buffalo. The record here is devoid of any evidence to suggest that without such policies, residential patterns would have been substantially different.

There is first the striking lack of evidence on the degree of impact of the alleged FHA housing discrimination upon residential patterns. The record does not disclose the importance of FHA financing in providing home ownership opportunities in Buffalo. In a city made up of primarily one and two-family middle-class owner-occupied homes, it would be FHA policies of all the factors addressed by the Court which would have a substantial impact upon the ability of middle-class whites and blacks to secure mortgage financing in such homes. But there is no evidence in the record to suggest

whether the policies complained of actually affected the segregated residential patterns.

The evidence with respect to alleged discrimination within the Buffalo Municipal Housing Authority (BMHA) fails to support the Court's general conclusions against the defendants. The BMHA, as a public benefit corporation, is a separate legal entity not controlled by any of the defendants (See New York Public Housing Law, § 3(2) & Art. III). The evidence is at best inconclusive on the degree of segregation within and among the various BMHA housing units. Whatever practices may have existed to allow white applicants to avoid living in predominantly black housing units, the Court's own finding is that any discriminatory practices that may have existed ended by 1970. But the real objection to all of the evidence on racial discrimination and the BMHA is that it proves nothing of relevance to the case. No evidence explains whether the siting of BMHA housing projects were discriminatory or segregative in purpose. No evidence suggests any complicity between the City defendants and the BMHA in any regard whatsoever. By so heavily relying upon the racial composition of the various BMHA units, the District Court attempts to equate segregative purpose to the BMHA in the same way it seems to attribute such a purpose to the Buffalo Public School System. This is patently fallacious.

The plaintiffs offered no evidence to show the impact of BMHA tenant policies upon the racial composition of the school system. In the absence of such proof, we are left to speculate on the relationship of any of BMHA's actions or inactions to the central question of whether the racial imbalances within the Buffalo Public School System were caused by official conduct of the named defendants in this action.

The Private Real Estate Industry

The Court describes at some length the efforts of real estate brokers to prevent blacks from purchasing homes in predominantly white neighborhoods (Appendix at pp. 1179-1181). Whether and to what extent such conduct actually contributed to segregated housing patterns is again not established. More significant is the complete lack of any formal or informal involvement between this private action and the City defendants as required by the test suggested in *Higgins v. Board of Education of City of Grand Rapids*, 508 F. 2d 779, 788 (6th Cir., 1974).

In *Higgins v. Board of Education of City of Grand Rapids*, 508 F. 2d 779, 788 (6th Cir., 1974) actions of independent agencies were rejected as evidence of school boards' segregative intent. In *Higgins, supra*, the actions included the established practice of enforcing restrictive covenants before *Shelley v. Kramer*, 334 U.S. 1 (1947), the practice of title insurance companies of excepting restrictive covenants from title insurance policies even after they became unenforceable, and the considerations in the Federal Underwriting Manual of racial segregation as a factor in keeping high real estate ratings. These "guidelines" issued by the F.H.A. in 1935, 1936 and 1938 are presumably the same policies referred to by the Court in the instant case (Appendix at pp. 1179-1181). Relying upon its earlier ruling in *Deal v. Cincinnati*, 369 F. 2d 55 (6th Cir., 1967), that discrimination by other than school authorities cannot be relied upon as the sole basis for showing a violation by the school board, the Court in *Higgins* held the use of such actions to be improper in the absence of any indication that school officials had any complicity in such allegedly segregative acts or any showing of a causative relationship between the alleged discriminatory acts and residential segregation in Grand Rapids. In *Deal, supra*, the

alleged discriminatory conduct of the local real estate industry was held not state action for fourteenth Amendment purposes because the school board was not responsible for its conduct.

As was said by the Sixth Circuit in the second *Deal* case:

"Boards of Education can hardly be blamed or held responsible for neighborhood residential patterns.

In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young." *Deal v. Cincinnati Board of Education*, 419 F. 2d 1387 at 1392 (6th Cir., 1969).

The error in imputing responsibility for changes in racial mix within a school system caused by factors beyond the control of a school board was explicitly recognized by the Court in *Pasadena City Board of Education v. Spangler*, U.S., 46 L Ed 364, 96 S.Ct. (1975), holding that changes in school racial composition caused by such factors could not require periodic alteration in the Court-imposed desegregation plan. If such factors cannot be properly used to require special remedial actions by a school board, it follows, City appellants submit, that such outside influences cannot, according to the *Spangler* rationale, serve as any basis for finding liability in the first instance which provides the predicate for any remedy.

Since less discriminatory conduct by independent agencies was used by the Court below to impose an obligation on the City defendants to act affirmatively to eliminate racial imbalance in the Buffalo Public School System, such use was, therefore, reversible error. There was in this record, as in *Higgins*, no evidence of any complicity between the Board or

City government and any of the established actions by the FHA, the BMHA or private real estate industry, nor was there any showing of any causative relationship between such acts and residential segregation in Buffalo.

City of Buffalo Housing Policies

The only evidence attributable to the City of Buffalo with respect to alleged segregated housing patterns is the Ellicott Urban Renewal relocation problem (Appendix at p. 1181). This statement of a complex problem is somewhat simplified by the Court. One major difficulty with this part of the Court's opinion is that the City of Buffalo is not, and as explained in Point I of this brief, could not be a defendant. The Common Council and the Mayor are named as parties but the Mayor was not found on this record to have been guilty of any segregative acts. Since there is no evidence to establish that the Urban Renewal program in question was the exclusive product of the Common Council, this Court's finding and attribution of responsibility to the City on this item is clearly erroneous.

It is suggested that as part of a major slum clearance project the City government did not relocate minority families thus displaced in a fashion designed to achieve greater integration throughout the City and thus presumably the school system. Precisely what legal obligation the City was under to do so and to what extent racially segregated housing patterns were thus affected is not explained by the evidence or the Court. Again, we are left to speculate on how this failure (established by a generalized statement from a federal grant application) contributed to the alleged segregated school system. We may even assume again *arguendo* that some degree of racial impactation may have resulted. Whether such an unknown additional amount of minority housing con-

centration has legal or constitutional significance is arguable at best. There is clearly nothing in the record on this point to justify a conclusion that such relocation decisions were racially motivated (*Washington v. Davis*, 426 U.S. 229 [1976]). In the absence of such evidence, the use by the Court of this element of proof was reversible error.

POINT V

The District Court erred in disregarding substantial evidence which negated its findings of segregative intent against City appellants.

The District Court found that the evidence supported a finding that a substantial portion of the school district was segregated by the intentional discriminatory actions of the appellants. In arriving at this finding, the District Court afforded mere lip service to the evidence that clearly illustrated the racial isolation that existed in the system prior to 1964 and those actions of the School Board that produce integrative results. These two factors, City appellants submit, substantially rebut the findings of the District Court in these two regards. Those actions of the School Board that produced integrative results are specifically as follows:

- 1) In 1973, of the 13 high schools in the system, only East and Fosdick had a minority enrollment that exceeded 50 percent. However, 6 of the 13 are racially balanced and no school has a minority enrollment of less than 10 percent. This improvement was the result of efforts of the Board in changing assignment districts and granting transfers to inner city blacks. Additionally, this did not improve the racial imbalance of black schools, but the racial balance in what were predominantly white schools has improved.

2) In the Quality Integrated Education Program, 3,000 elementary black students have been transported to majority schools yearly for some years.

3) The adoption of the use of portable classroom, heretofore discussed, for integrative purposes also improved the racial balance at majority schools.

4) Efforts to recruit minority teachers into the system and the promotion of blacks into administrative posts did bring more black teachers into the system and increased the number of blacks in administrative posts.

5) The changing of West Hertel Junior High School to a middle school for purely integrative reasons produced a racially balanced school and reduced the number of black students attending racially isolated schools.

6) The planning for the East Side High School which would have opened as an integrated school, had the money been available.

The District Court acknowledged these actions, but found them not to have produced sufficient desegregative results. In this regard the Court missed the point. This not being a remedy case, the test was not one of effect, but rather one of intent. Therefore, the bona fide efforts of the School Board to integrate the system are highly relevant, regardless of their actual effects.

Appellants submit that these actions clearly refute the finding of the District Court that the actions of the School Board were racially motivated.

It is crystal clear from the record that little of the evidence produced at the trial predates the *Yerby Dixon* decision by Commissioner Allen (Appendix 1749). The Commissioner

found that the extensive racial isolation that existed was "de facto" in nature. Nothing in this record supports a conclusion to the contrary. At the trial there were 22 elementary schools that were heavily black, and 15 of them were cited by the Commissioner in *Yerby Dixon* as examples of widespread racial isolation in the system (Appendix 1750-51). Two were special schools. The District Court totally ignored these figures, and no evidence was produced to support any other finding than the finding of Commissioner Allen that they were "de facto" segregated. In addition to these 15, there is no evidence in the record that could even arguably support a finding of causation with respect to Schools 59, 62 and 90.

The District Court also ignored the fact that no evidence was produced which would even vaguely establish a link between Board action and the segregated Clinton Junior High School.

The District Court ignored the fact that Genesee-Humboldt High School was opened as a majority school and in 1966 sometime after opening was still majority (Appendix 1344). Fillmore Middle School was in 1966 a majority school and one could reasonably conclude that upon opening, it was even more majority than in 1966 (Appendix 1344).

There is no evidence submitted which supports a finding that since opening these schools changed from majority schools to minority schools as a result of discriminatory actions or policies of the Board. If the Board's policies were as segregatively motivated and perverse as the plaintiffs and Court suggest, it would seem reasonable to expect that the effects of such policies would be readily observable at these middle schools. That they are racially imbalanced today is dramatic proof that the real causes are not School Board policies but changing neighborhood residential patterns, over which none of the City appellants has any control.

Conclusion

The order appealed from should be reversed in all respects and the action dismissed. In the alternative, the case should be remanded for specification of the violations requiring remedial action by City-Appellants.

Respectfully submitted,

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Date: April 2, 1977

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County of Genesee) ss.:
City of Batavia)

Re: George Arthur et al vs.
Ewald P. Nyquist et al
Nos. 76-7202
76-~~7312~~ 7391

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Leslie R. Johnson

Sworn to before me this

5th day of April, 19 77

Patricia A. Lacey

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NOTARY PUBLIC, State of N.Y., Genesee County
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Sworn to before me this
5th day of April 1977

Patricia A. Lacey

PATRICIA A. LACEY
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My Commission Expires March 30, 1979.